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90-696

No. _____

In The

Supreme Court of the United States

October Term, 1990

LEO HEIDEMAN and SHIRLEY HEIDEMAN,

Petitioners,

vs.

PFL, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust
Building
922 Walnut Street
Kansas City, MO 64106
(816) 221-2288

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Does the Eighth Circuit's decision conflict with decisions by other Courts of Appeals which have held that whether the ADEA statute of limitations is tolled because of affirmative misconduct of the employer ordinarily is a question of fact which precludes summary judgment?

2. Did the Court of Appeals, in affirming summary judgment against a victim of a blatant, yet concealed scheme of willful age discrimination, sanction the district court's improper application of Rule 56 of the Federal Rules of Civil Procedure, ignore the humanitarian purposes underlying the ADEA and its doctrines for "tolling" statutes of limitations, in a manner that requires this Court to exercise its important power of supervision?

3. Does not the opinion below improperly apply and extend this Court's oft-cited "trilogy of cases" construing Rule 56, thereby violating plaintiffs' fundamental and important federal guarantee of jury trial of factual issues, by affirming a District Court decision which unquestionably weighed factual issues, derived its own adverse inferences, and resolved all doubts against the petitioner, all in a manner directly contrary to the law of this Court, the Eighth Circuit itself, and other Federal Courts of Appeal?

4. Should not all of plaintiffs' claims be reinstated for trial?

TABLE OF CONTENTS

III.

IMPROPERLY FAILED TO FOCUS ON THE UNDISPUTED EVIDENCE OF EMPLOYER MISCONDUCT AND CONCEALMENT OF A PLAN OF AGE DISCRIMINATION, WHICH BY ITS VERY NATURE SUPPRESSED THE TRUE FACTS AND JUSTIFIED TOLLING UNTIL THE PLAN WAS UNCOVERED FOR PETITIONER, AND OTHER VICTIMS. INSTEAD, THE DISTRICT COURT AND COURT OF APPEALS IMPROPERLY EXAMINED AND WEIGHED PLAINTIFF'S WORDS AND CONDUCT, IMPROPERLY WEIGHED EVIDENCE AND INFERENCES AGAINST HIM, THEREBY REACHING SUPPOSED "CONCLUSIONS OF LAW" ON WHAT WERE TRULY FACTUAL ISSUES FOR THE JURY... 16

II. UNDER PROPER APPLICATION OF RULE 56(c), THE CIRCUMSTANCES OF THIS CASE PRESENT PRECISELY THE SORT OF DISPUTED FACTUAL ISSUES WHICH THE SEVENTH AMENDMENT, THE DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT, AND OTHER COURTS OF APPEALS REQUIRE TO BE RESOLVED BY A JURY..... 36

III. THIS COURT SHOULD AUTHORITATIVELY DECIDE THE PROPER REACH OF SUMMARY JUDGMENT WHEN IT IS URGED THAT THE STATUTE OF LIMITATIONS UNDER THE ADEA IS "EQUITABLY TOLLED" OR "EQUITABLE ESTOPPEL" SHOULD APPLY UNDER CIRCUMSTANCES SUCH AS ARE PRESENT HERE, AND SHOULD RESOLVE THE CLEAR CONFLICT AMONG CIRCUITS IN APPLICATION OF THE RULES OF TOLLING UNDER

TABLE OF CONTENTS TO APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

X.

Rules

No.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 904 F.2d 1262 (8th Cir. 1990) and is set out in the Appendix at A 1-A13. The unpublished order denying rehearing is set out at A30. The District Court's opinion of April 11, 1989 is reported at 710 F.Supp. 711 (W.D.Mo. 1989), and is set out at A31 - A79.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1990. A timely petition for rehearing was filed, which was denied on July 31, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

The statute of limitations under the ADEA, 29 U.S.C. §626, provides in pertinent part as follows:

> (d) No civil action may be commenced by an individual under this section, until sixty (60) days after a charge alleging unlawful discrimination has been filed with the Equal Opportunity Commission.

Such charge shall be filed --

> (1) Within one hundred-eighty (180) days after the alleged unlawful practice occurred ....

(e)
(1) §255 and 259 of this title shall apply to actions under this chapter *

*29 U.S.C. §255 Statute of Limitations

Any action commenced ... under the Fair Labor Standards Act ... (a) if the cause of action accrues on or after May 14, 1947 -- may be commenced within two (2) years after the cause of action accrued, and every such action shall be forever barred unless commenced within two (2) years after the cause of action accrued, except a cause of action arising out of a willful violation may be commenced within three (3) years after the cause of action accrued;

Rule 56, Fed. R. Civ. P., provides in pertinent part as follows:

(c) Motion and Proceedings thereon. [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party in entitled to a judgment as a matter of law ....

STATEMENT OF THE CASE

Petitioners commenced this action November 25, 1987, in the Circuit Court

of Jackson County, Missouri. Defendant removed the case to the United States District Court for the Western District of Missouri, on January 4, 1988. The Complaint raised five claims: Age Discrimination (Count I); Violation of ERISA (Count II); Common Law Fraud (Count III); Intentional Infliction of Emotional Distress (Count IV); and Shirley Heideman's claim for loss of consortium (Count V). After discovery, defendant moved for summary judgment based solely on applicable statutes of limitation for each of plaintiffs' claims. By order dated April 11, 1989, the district court granted defendant's motion for summary judgment on all counts, including the state common law claims, based on statute of limitations. Jurisdiction in the district court was based on 28 U.S.C. §1331 (federal question) and 28 U.S.C.

§1332 (diversity jurisdiction).

Leo Heideman, born in 1926, was employed by PFL, a wholesale food distributor headquartered in Duluth, Minnesota, from 1964 until his discharge in June, 1979.[1] Mr. Heideman worked out of his home in Kansas City, and traveled to corporate headquarters in Duluth, approximately once a month.

Just before Christmas in 1976, while plaintiff was Vice President, Sales, for the Central division, he was informed by Carl Hill, just-appointed Senior Vice President of Marketing and Sales, that if he wished to stay with the company he would be required to move to the position of manager of the Memphis region. In a short conversation, "less than fifteen minutes," Mr. Hill told Heideman that he

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[1] PFL, Inc. was the maker of Jeno's Pizza Rolls and other products.

simply "wanted his own man" as vice president in the Central region; and Hill wanted Heideman to build up the Memphis region. Mr. Heideman would not receive any reduction in pay, and he testified he believed Carl Hill's attitude was "positive about my move." Mr. Heideman accepted as sincere Hill's statements that Hill simply wanted individuals selected directly by him to serve as divisional vice presidents; and that he was needed by Hill to build sales in Memphis. Heideman decided to accept the relocation, testifying, "it wasn't a choice that I had any resentment over to move to Memphis."

Mr. Heideman advised defendant in early January, 1979 that he would accept the position in Memphis, and he began serving the Memphis region by traveling the area, although the Heidemans did not move there

until April, 1979.

On June 1, 1979 -- less than six weeks after the Heideman move, Heideman's immediate supervisor, John Parr, telephoned him and told him he was being terminated immediately. When Mr. Heideman asked why, Parr responded, "Because Carl Hill has made the determination that you don't fit into his plans," and "that was it." Heideman unsuccessfully sought to talk to Carl Hill, and the company owner Jeno Palucci, but this was refused.[2]

Importantly, Mr. Heideman testified that he really did not "have the

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[2] Of course, what Mr. Heideman did not know was that he didn't "fit Carl Hill's plans" because he was in "the problem age," and thus had to be weeded out so Parr could earn his "non-quotaed" bonus, pursuant to the Hill memo, which sets forth in graphic detail the secret scheme of age discrimination that triggered this lawsuit. (see Appendix A to the District Court Opinion, 710 F. Supp., at 723-724).

slightest idea" who replaced him when he was fired on June 6, 1979, and he did not recall talking to anybody about who replaced him as regional manager in the Memphis area.

Mr. Heideman testified that after Parr refused to allow him to talk to Carl Hill or Jeno Palucci, and after his own futile attempts to reach them by phone, he set about trying "to find out exactly why Carl had instructed John to terminate me and exactly what the reason was." (Heideman Depo., 85). Mr. Heideman went to the NLRB in Memphis, Tennessee to see if he could get some help in forcing defendant to tell him the reason for his termination. Mr. Heideman was told that the agency could not help him, because an employer did not have to give a reason

for discharge.[3] The NLRB representative referred Mr. Heideman to a private attorney, who confirmed that the employer did not have to give him a reason for discharge. Importantly, Mr. Heideman testified that he learned, "I didn't have anything to stand on." (Heideman Depo., 126). The attorney offered to look into the matter if Mr. Heideman was willing to pay $70.00 per hour, but "he also told me that I had no legal recourse." Under those circumstances, Mr. Heideman testified that since he had just been discharged, had been stranded in Tennessee with no prospects for employment and "did not have the money to

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[3] Mr. Heideman went to the NLRB because he knew that in Missouri he could demand a "service letter," which would achieve two things: (1) He could find out why he was terminated, and (2) he knew he could have a letter that might help him find another job: "Essentially, I was trying to find out why I was terminated."

retain him," it did not make sense to employ the attorney, so he did not pursue the matter.

In his visits to the NLRB and the attorney, "Nobody (attorney or NLRB) ever told me that I could file a charge of discrimination with anybody."[4] Heideman received a letter dated June 12, 1979 from Jeno Palucci, suggesting that Heideman was fired because he had not worked hard enough. Assessing Mr. Palucci's letter, Mr. Heideman testified, "I was groping to find out why the hell I was fired, seemed to me like somebody here was groping [also as to] why somebody . . . fired me, maybe somebody told him [Jeno] that stuff."

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[4] It was stipulated below that Mr. Heideman knew nothing about his rights under ADEA, and "never suspected" he might have been the victim of age discrimination until the Hill memo fell into his hands years later.

Heideman testified that after going to see the NLRB, after seeing the attorney, after receiving the letter from Jeno Palucci, and after having no luck changing the attitudes expressed in Palucci's letter, Heideman did not recall making any other effort to find out why he had been fired, and he testified he did not believe there was anything more he could do. Heideman testified he had "no suspicion that he had been fired because of his age;" he "never considered the age thing as a reason;" and from the time John Parr told him in '79 that he "did not fit Carl Hill's plans" up until receipt of an unsolicited copy of Hill's "Read and Destroy" memo on August 29, 1986, Mr. Heideman did not have any way to dispute or disprove what Parr had told him. (Heideman Depo., at 178).

The termination was a shock; the

Heidemans were stranded in Tennessee with a new home and no income. They immediately decided to move back to Kansas City, where Mr. Heideman tried to find a job. He held full-time jobs until he began losing his eyesight due to diabetes in about 1984, gradually reducing to part-time, and then in-home employment. He is now unable to pursue outside employment, and is on social security disability.

On August 29 or 30, 1986, Mr. Heideman received an unsolicited copy of Hill's "smoking gun" memo. It was sent by Larry Williams, who had filed an age discrimination lawsuit against the same defendant on June 14, 1985, settling it in 1986 just before Williams mailed the memo to plaintiff.[5] Heideman had not in

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[5] It must be emphasized that the memo was not turned over by the defendant to Mr. Williams during discovery, but was

any way been aware of Mr. Williams' lawsuit, or that it involved an age discrimination claim, until after he received the memo and talked to Mr. Williams. Mr. Heideman testified that until he received the unsolicited copy of Hill's memo, he in no way suspected that he may have been the victim of age discrimination, did not have any idea or suspicion that age had been any part of the reason for his discharge, and that "the earliest time" that he believed he had such facts to "put it all together"

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obtained by Mr. Williams through a totally independent source, and revealed to Mr. Heideman by Williams' own initiative. Indeed, the record below included the fact that defendant tried to obtain all memo copies Williams and his lawyer had, offering additional settlement money to "seal the record" and bury the memo. Williams refused, and the memo found its way to Heideman and, later, to five other discharged employees whose later-filed actions survived summary judgment in the District of Minnesota.

to support a belief he had been deceived so as to have a lawsuit for fraud was upon receipt of the Hill memo. (Heideman Depo., at 178). Within two or three days of the receipt of the Hill memo, Heideman visited the EEOC, filed his charge of discrimination on September 5, 1986, and filed suit a little more than one year after receiving the Hill memo.

The Hill memo drips with intent to conceal the invidious policy of discrimination from intended victims. In addition to instructions to "Read and Destroy," Hill directs that employees in the "problem age" of 45 to 50 should be given innocent sounding, pretextual reasons for discharge: "telling him his future at Jeno's is limited," such that "no one needs to be the wiser and we would then be able to reorient that region with younger, more motivatable

personnel." True to Hill's insidious plan -- including explicit provisions to conceal the plan and its effects from the intended victims -- Mr. Hiedeman was "none the wiser," was duped into accepting the vague reasons for discharge (despite some misgivings), because under all the circumstances, he believed he "had no other recourse." During the same week Mr. Heideman was fired, two other well-performing employees in the "problem age group" also were fired.[6]

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[6] Don Fifield and Ronald Schermerhorn filed age discrimination cases against the same defendant in 1988 -- nine years after their discharge. Yet their cases and the cases of Richard McFadden, Frank Faso, and William Brand remain alive and well in the United States District Bourt for the District of Minnesota, precisely because Judge Magnuson in the District of Minnesota held that the memo itself suggested employer misconduct and concealment of the claims, such that, "the court is unable to say that no issues of material fact remain to prevent defendants from being entitled to judgment."

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS OPINION, AFFIRMING SUMMARY JUDGMENT IN WHAT THE DISTRICT COURT CALLED "AN OPEN AND SHUT CASE OF AGE DISCRIMINATION," DIRECTLY CONFLICTS WITH OTHER CIRCUITS ON THE IMPORTANT FEDERAL QUESTION OF WHEN AFFIRMATIVE EMPLOYER MISCONDUCT RAISES FACTUAL ISSUES SO AS TO TOLL THE STATUTE OF LIMITATIONS UNDER THE ADEA AND FORBID SUMMARY JUDGMENT. AT THE VERY LEAST, THE EVIDENCE BY NO MEANS POINTED ALL DEFENDANT'S WAY, AND, THEREFORE, UNDER THE ESTABLISHED PRINCIPLE OF LAW THAT A PARTY RESPONSIBLE FOR WRONGFUL CONCEALMENT IS ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS AS A DEFENSE, THE DISTRICT COURT, AND THE COURT OF APPEALS IMPROPERLY FAILED TO FOCUS ON THE UNDISPUTED EVIDENCE OF EMPLOYER MISCONDUCT AND CONCEALMENT OF A PLAN OF AGE DISCRIMINATION, WHICH BY ITS VERY NATURE SUPPRESSED THE TRUE FACTS AND JUSTIFIED TOLLING UNTIL THE PLAN WAS UNCOVERED FOR PETITIONER, AND OTHER VICTIMS. INSTEAD, THE DISTRICT COURT AND COURT OF APPEALS IMPROPERLY EXAMINED AND WEIGHED PLAINTIFF'S WORDS AND CONDUCT, IMPROPERLY WEIGHED EVIDENCE AND INFERENCES AGAINST HIM, THEREBY REACHING SUPPOSED "CONCLUSIONS OF LAW" ON WHAT WERE TRULY FACTUAL ISSUES FOR THE JURY.

Truly there is little risk of overstatement in saying the factual and

legal circumstances of this case may be unlike any this Court has seen, or is ever likely to see again. Yet, petitioners recognize the danger that, amidst the crush of petitions received daily in this Court, this case could be shrugged off as merely one more isolated, individualized injustice, which is unimportant in the larger scheme of cases some feel this Court should review. Nothing could be further from the truth. This case cuts across many important areas of federal law which must be resolved authoritatively by this Court. The Eighth Circuit's opinion is in utter conflict with other circuits in construing the doctrines of equitable tolling and estoppel under ADEA statutes of limitations; as a result, the often-described "humanitarian," "remedial" purpose of this legislation has been

obliterated and the exact opposite of the required "expansive and liberal" construction of the ADEA is left in its wake.

Here, unlike most discrimination cases, a belatedly revealed, long concealed "smoking gun" memo gives black-and-white proof of a secret, purposeful plan of age discrimination. The Eighth Circuit gives lip-service to the doctrine allowing equitable tolling when there appears "[s]ome positive misconduct by the party against whom it is asserted." Yet, the Court astonishingly refuses to recognize that the "Read and Destroy" memo, with its self-contained directions for oppression of the discriminatory scheme, itself establishes such affirmative misconduct and fraudulent concealment by the employer that the evidence could by no means point all defendant's way on

whether defendant intended plaintiff (and others) to be lulled into inaction.

Years ago this Court, speaking through Justice Black, relaxed a statute of limitations based on the "maxim that no man may take advantage of his own wrong," a principle he described as "older than the country itself." Glus v. Brooklyn Eastern District Terminal, 359 U.S.231, 233 (1959). The Eighth Circuit, by contrast, failed to see how defendant's misconduct could have any effect on its statute of limitations defense:

> Whether or not an employer tells its employee the true reason for the adverse employment decision is not the standard. Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions.

(A15-16). Only this Court can correct this profound misstatement of law, for such misconduct is not only "relevant" but is at the very core and foundation of

the estoppel doctrine.

Nowhere does the Court of Appeals (or district court) recognize the fundamental rule applied in other circuits, that when equitable tolling or equitable estoppel is involved, summary judgment seldom is appropriate:

> In ADEA cases, equitable tolling or equitable estoppel almost invariably involves the credibility of the various witnesses and credibility is difficult to determine from affidavits or depositions .... Accordingly, summary judgment seldom will be appropriate when tolling is in issue.

Aronsen v. Crown-Zellerbach, 662 F.2d 584, 595 (9th Cir. 1981).

The following cases fall on plaintiffs' side of the ledger, and hold -- in sharp conflict to the opinion here -- that whether the two-year and three-year statutes of limitations under the ADEA, (and the 180-day EEOC filing period) may be tolled for equitable considerations

presents questions of fact preclusive of summary judgment: Meyer v. Riegel Product Corporation, 720 F.2d 303 (3rd Cir. 1983); Wilkerson v. Siegfried Insurance Agency, Inc., 621 F.2d 1042 (10th Cir. 1980); Dartt v. Shell Oil Company, 539 F.2d 1256 (10th Cir. 1976); Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Aronsen v. Crown-Zellerbach, supra, 662 F.2d 584 (9th Cir. 1981); Ott v. Midland Ross Corporation, 600 F.2d 24 (7th Cir. 1979); Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977); Ott v. Midland Ross Corporation, 523 F.2d 1367 (6th Cir. 1975); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); Cocke v. Merrill-Lynch & Co., Inc., 817 F.2d 1559 (11th Cir. 1987). All of the foregoing

cases recognize that whether the facts can be "reasonably construed so as to permit equitable estoppel or tolling is a factual question that requires factual development." Aronsen, supra, 662 F.2d, at 595. It is significant that the Eighth Circuit did not cite one single "deliberate misconduct" case among the many which petitioners painstakingly (yet vainly) brought to its attention. Instead, the Court cites inapposite ADEA "notice posting" and similar cases which do not even involve allegations -- much less the proof shown here -- of employer misconduct as the basis for tolling.

Reeb v. Economic Opportunity Atlanta, Inc., held that limitations do not begin to run until facts which would "support a cause of action are apparent," or should be apparent, "to a person with reasonably prudent regard for his rights." The Reeb

court specifically held that the conduct of the defendant in giving a misleading reason for discharge is a key determinant, under the principle espoused in Glus, supra,"that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense." 516 F.2d, at 930. Once a difficult showing of active misconduct is made -- as it has been in this case -- the law of equitable estoppel steps in and says that the wrongdoer will not profit from successfully carrying out its misdeeds of concealment:

> No man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Reeb, supra, 516 F.2d, at 930.

The Reeb court remanded for factual findings, making this important

observation:

> Secret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the person discriminated against. Indeed, employers that discriminate undoubtedly often attempt to cloak their policies with a semblance of rationality and may seek to convey to their victims an air of neutrality or even sympathy. <u>These tendencies may even extend to giving of misleading or false information to the victim</u>, as is alleged in the present case.

516 F.2d, at 931. The foregoing quotation sounds as if the <u>Reeb</u> court were reading from the explicit directives of the Hill memorandum to give misleadingly neutral, vague information to the victims of the discriminatory scheme, to cover-up the illegal plan so that "no one will be the wiser." It is vital to say that since the employer was aware of the ADEA (it gave affidavits below of duly posting "notice" to employees of their rights), the clear

inference Mr. Heideman was entitled to on summary judgment -- yet was denied by the opinion here -- is that the employer directed the cover-up to keep the company from being sued. Under all the cases cited herein yet ignored by the Eighth Circuit, if there is a "triable issue" suggesting the employer had a "design" to mislead plaintiff so as to conceal his cause of action, there simply is no doubt about it -- equitable estoppel applies. Yet, the Court of Appeals stunningly ignores this cover-up, sloughing it off as "not especially relevant." Interestingly, the last paragraph of the Eighth Circuit opinion dramatically illustrates why summary judgment should have been reversed -- even while the Eighth Circuit apologizes for not doing so:

> It is difficult to imagine a more offensive document in a case such as

> this than the "smoking gun" memorandum around which this cause of action centers, ... The memorandum evidences a deliberate and reprehensible company policy of discrimination against its older employees. The document even goes so far as to recommend bonuses for the managers charged with the policy's implementation, payment of which presumably would depend upon their success in getting older employees out of PFL ....

A27-28. The "deliberate and reprehensible policy" acknowledged by the opinion should have been the singular focus by which defendant's summary judgment motion should have failed.

Two cases deserve special note: Meyer v. Riegel Products Corp., supra, 720 F.2d 303 (3rd Cir. 1983), an ADEA case, and Richards v. Mileski, 662 F.2d 65 (D.C. 1981), a non-ADEA case. In Meyer, the Third Circuit held that not even plaintiff's suspicion of age discrimination at the time of his discharge, coupled with consultation with

an attorney soon thereafter, would conclusively bar the tolling of the statute of limitations. With proper acknowledgement of the "humanitarian " purposes of the ADEA and the limitations of summary judgment under Rule 56, the Third Circuit reversed and remanded for trial. The Opinion in Heideman is in absolute conflict with the persuasive Meyer holding. Meyer is vitally important because Meyer simply holds that circumstances such as those presented herein raise genuine issues of material fact preclusive of summary judgment.[7]

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[7] The opinion here (and in the court below) gives conclusive effect to Heideman's consultation with a lawyer: "Heideman consulted a lawyer and declined his offer to pursue the matter ...." The Meyer court persuasively refused to give conclusive effect to such consultation:

> Indeed, perhaps the reason defendant has failed to cite any case in which a court permitted consultation with a lawyer to negate an allegation of employer deception is that such a

In Richards, an employee was forced to resign under duress of false charges of homosexual activity. The employee acknowledged that he was aware of the falseness of the charges in 1955, but he did not file his action until 1978, when he first became aware of knowingly false reports filed by investigators and his superiors that led to the charges and his subsequent forced resignation. Despite the plaintiff's knowledge in 1955 of the falseness of the charges against him (similar to the Court of Appeals conclusively hanging Mr. Heideman on his belief that "something was amiss" in that the reasons for discharge did not ring

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> holding would be both strikingly inconsistent with the purposes of the anti-discrimination statutes and completely devoid of common sense.

720 F.2d, at 309. Also see Dartt v. Shell, supra, 539 F.2d 1256 (10th Cir. 1976).

true), and despite the twenty-three (23) year wait until plaintiff actually filed his action, the D. C. Circuit held that the facts did not justify dismissal, and did not conclusively show that plaintiff failed to exercise "due diligence" in discovering the material facts underlying the cause of action. 662 F.2d, at 71. As is true with Mr. Heideman, the plaintiff in Richards believed that he had been the victim of false charges at the time of his forced resignation, but it was not until plaintiff discovered the plot with the incriminating information, that the court held that he possessed sufficient knowledge so that his cause of action accrued. What degree of fraudulent concealment is necessary to invoke equitable tolling? According to the D. C. Circuit: "Any word or act tending to suppress the truth is enough."

661 F.2d, at 70.

The conflict and confusion among circuits is shown by those decisions in the Eighth Circuit and elsewhere, which inexplicably and arbitrarily sanction a trial court's role in determining "as a matter of law" what the other circuits consider inherently "factual matters" preclusive of summary judgment. See, e.g. Wilson v. Westinghouse Electric Corp., 838 F.2d 286 (8th Cir. 1988); English v. Pabst Brewing Company, 828 F.2d 1047 (4th Cir. 1987); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir.), cert denied, 459 U.S. 944, 103 S.Ct. 257 (1982); Vaught v. R. R. Donnelly & Sons Company, 745 F.2d 407 (7th Cir. 1984); Kazanzas v. Walt Disney World Company, 704 F.2d 1527 (11th Cir. 1983); Blumberg v. HCA Management Company, 848 F.2d 642 (5th Cir. 1988),

cert denied, 109 S.Ct. 789 (1989).

The fact that the rules for determining summary judgment were drastically violated below is unerringly established by a later ruling in another district court within the Eighth Circuit, wherein the district court denied summary judgment on precisely the same legal issues and factual circumstances, against the same defendant.[8] In McFadden, et al. v. ETOR Properties Limited (A80), the same defendant argued that "Heideman is indistinguishable from the instant case." District Judge Magnuson issued a decision exactly opposite to Judge Oliver, thus

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[8] The case was decided December 26, 1989 -- after briefing to the Eighth Circuit, but before oral argument. The existence of this important, totally countervailing result was timely reported to the court well before argument and months before the decision; yet not one word is written about this anomaly of equal "justice" under the "rule of law" the Eighth Circuit professes to apply.

showing that the evidence could not "point all one way in defendant's favor" and that two "reasonable minds" could reach differing results.

As was pointed out to the Eighth Circuit during oral argument, the material, identical facts in the Heideman case and the Minnesota case begin and end with the Hill memorandum. As stated earlier, Fifield and Schermerhorn were fired the same week as Heideman. Heideman filed nearly two years earlier, but is barred from court while their actions proceed.

Because this is the rare case where plaintiff can prove both the discriminatory scheme and the plan to conceal it, thus raising at least triable issues of whether the limitations period should be relaxed or modified under the circumstances, Judge Magnuson's

recognition of the point is extremely telling for Heideman and all victims of the illegal plot:

> The Hill memorandum provides strong evidence that Jeno's not only had a policy of discriminating against older employees, but that Jeno's management took steps to conceal its policy.

A93-94. Judge Magnuson further held that "for tolling purposes" the following passages of the Memorandum are instructive:

> If by some chance we have men approaching the problem age, we should be willing and ready to help those men move on by making their exit from Jeno's a comfortable one. This would be accomplished by having a frank discussion with a man between 45 and 50, and telling him his future at Jeno's is limited and that it would be advisable for him to look for work elsewhere.
>
> * * *
>
> No one needs to be the wiser and we would then be able to reorient that region with younger, more motivatable personnel.

Judge Magnuson found that "this language

at least creates a genuine issue of material fact with respect to the existence of a deliberate design by the employer to prevent plaintiffs from filing a timely discrimination charge." (A95). The Judge also held that "the note on the memorandum, to read and destroy the document, supports this conclusion." (A95).

In short, based on the clear conflict between and among the circuit courts (and district courts)[9] as to how to apply the doctrine of tolling/estoppel in the

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[9] District Judges Oliver and Magnuson reached opposite results on nearly identical facts, and indisputably identical legal issues. Other district courts also have refused to enter summary judgment where defendant's misconduct creates a genuine issue for tolling limitations: Potter v. Continental Trailways, Inc., 480 F.Supp. 207, 211 (D. Colo. 1979); Monnig v. Kennecott Corporation, 603 F.Supp. 1035 (D. Ct. 1985); Jones v. Premier Industrial Corporation, 611 F.Supp. 142 (N.D. Ga. 1985); Creamer v. General Teamsters Local 326, 560 F.Supp. 495 (D. Del. 1983).

context of summary judgment, and in light of the momentous fact that another judge has reached an entirely opposite conclusion than the judge in this case, petitioners respectfully suggest that this Court must intervene to resolve the conflict and provide clear guidance in line with the proper "rule of law." This Court also should intervene to prevent a miscarriage of the concept of "equal justice" under the rule of law, which is created by allowing five plaintiffs to go forward to trial, after having filed their charges and causes of action against the same defendant far later than plaintiff, while another court in the Eighth Circuit bars the doors to the Heidemans, under material facts and law indistinguishable for summary judgment purposes.

II.

UNDER PROPER APPLICATION OF RULE 56(c), THE CIRCUMSTANCES OF THIS CASE PRESENT PRECISELY THE SORT OF DISPUTED FACTUAL ISSUES WHICH THE SEVENTH AMENDMENT, THE DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT, AND OTHER COURTS OF APPEALS REQUIRE TO BE RESOLVED BY A JURY.

Petitioners believe this case illustrates the disturbing tendency of district courts and courts of appeals to misconstrue and expand (capriciously, unfortunately) this Court's recent "trilogy" of decisions dealing with Rule 56(c). Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electrical Industrial Company v. Zenith Radio Corp., 475 U.S. 574 (1986).[10] A reading of this Court's

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[10] The district court states, "This trilogy of cases clearly advocates a more liberal use of summary judgment." (emphasis added). 710 F.Supp., at 713. (A35); the Court cites an Eighth Circuit case espousing a view that this Court is

actual holdings shows (1) no mention whatsoever of "advocating a more liberal use of summary judgment"; (2) there is, in fact, no change whatsoever in the extremely heavy burden imposed on a party moving for summary judgment. In Celotex, for instance, Chief Justice Rehnquist merely disapproves of cases which previously regarded summary judgment as a "disfavored remedy" rather than "an integral part of the Federal Rules as a whole ...." 477 U.S., at 327. In Anderson v. Liberty Lobby, Inc., Justice White first reiterated the clear rule that, at the summary judgment stage, the trial judge's function is not to weigh the evidence and determine the truth of the matter -- as was improperly done in

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directing appeals courts to be "somehwat more hospitable to summary judgments than in the past." City of Mt. Pleasant v. Associated Elec. Corp., 838 F.2d 268, 273 (8th Cir. 1988).

the district court and by the court of appeals -- but to determine only whether there should be a trial:

> The inquiry performed is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party.

Anderson, 106 S.Ct., at 2511.

The actual holding in Anderson was that the heightened "clear and convincing" standard of proof for actual malice should be applied at the summary judgment stage in a libel action involving a public figure. Most important, far from advocating "more liberal use of summary judgment," Justice White warns against trial courts acting "other than with caution in granting summary judgment":

> Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not

> denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 U.S. at 158-159,.... Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Anderson, 106 S.Ct. at 2513-14 (Emphasis supplied).

In Hillebrand v. M-Tron Industries, Inc., 827 F.2d 363 (8th Cir. 1987), an ADEA case decided after the Supreme Court "trilogy," the Eighth Circuit reversed summary judgment and remanded for plenary trial on a claim under the ADEA, making the following important observations:

Summary rulings are the direct

> antithesis of the full and fair process found in an adversary proceeding .... Summary judgment should be sparingly used, and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion. Summary judgment should seldom be used in cases alleging employment discrimination, because of the special category in which Congress and the Supreme Court visualize these cases ....
>
> * * *
>
> In the present case, the trial court held that the extreme remedy of summary judgment was required. In doing so, the judge should have viewed all of the facts in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from those facts .... We are convinced that he failed to do so.

(Emphasis added). 827 F.2d, at 364-65.

Space limitations will not allow the petitioners to show here all of the ways in which the district court violated the rule of Hillebrand (and all courts) by weighing evidence and improperly construing the record against the

plaintiffs. Moreover, neither the district court nor the Eighth Circuit mentions the "special category in which Congress and the Supreme Court visualize ..." employment discrimination cases.

Petitioners believe the opinions below read like "findings of fact" by a trier of fact, and thus prove on their face that summary judgment standards were violated.[11] A couple of examples are

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[11] See the district court "conclusions": "Given the foregoing facts and circumstances surrounding Mr. Heideman's termination, we find and conclude the there were sufficient facts so that a reasonably diligent employee would have been put on notice of his cause of action." 710 F.Supp., at 720 (A67-68); "There is ample evidence that plaintiff did not rely upon the pretextual reason given, it was plaintiff's own lack of diligence that led him to the present impasse;" (A-69). Compare the Eighth Circuit's factual findings: "The Heidemans have not adduced facts to show that the delayed filing was due to the employer's concealment, misrepresentation...."; "There is nothing on the record to indicate that the company successfully misled Heideman or prevented him from

illustrative.

First, both the district court and Court of Appeals seize on the truly immaterial "fact" that when Hill reassigned Heideman to Tennessee he was replaced by Ed Korkki, who was significantly younger than plaintiff. Why the Court of Appeals and district court emphasized the "demotion" is hard to figure out -- until one realizes that both courts wanted to weigh this as a factor supposedly putting Heideman "on notice" that age discrimination already was at work, with one element of a prima facie case supposedly known and appreciated by him.[12] A further key

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discovering or pursuing his rights under the ADEA;" (A7).

[12] But the facts favorable to Mr. Heideman -- completely missing from both decisions -- are that he willingly accepted the transfer, accepted as sincere Hill's statements that he would be allowed to build up the Memphis

circumstance which was ignored below but which would be available for development at trial is that people were routinely moved, transferred, demoted and fired at Jeno's. This was key evidence emphasized in the Minnesota case and here, since Mr. Heideman testified there were "a lot of personnel changes, it was kind of like spinning the wheel." Why did the Court of Appeals and district court not emphasize Mr. Heideman's utter lack of knowledge regarding who replaced him at the time of his termination, since the record is unclear as to what he knew, when he knew it, and whether he had "any idea" other than guesswork? The omission is significant, because under the Court

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region, and that Hill simply wanted his own man as vice president. Mr. Heideman testified he had absolutely "no resentment" over the move or Mr. Korkki replacing him, and believed Hill was being "positive" about the move.

of Appeals opinion, it is the termination date which triggered all kinds of conclusive, constructive notice to Mr. Heideman of the accrual of all of his causes of action.

Another glaring example of weighing facts and inferences against the plaintiff arises from the Eighth Circuit's misstatement of fact regarding Heideman's visit to an attorney:

> The lawyer offered to pursue the matter, but Heideman declined because of the cost. (A-4); The cost of engaging private legal services, however, does not justify equitable tolling. If it did, the 180-day limitations period would be rendered largely meaningless. (A20).

The district court and Court of Appeals totally ignored what the record as a whole showed -- when weighed in Mr. Heideman's favor -- namely, 1) that the attorney advised Mr. Heideman that he did not think he would be able to be of any

help; and 2) after Mr. Heideman's trip to the NLRB and the attorney, he believed he "had no legal recourse," and that the employer's reasons for discharge apparently were legally sufficient, since the employer did not have to give (or even have) a reason for discharge, and thus he "didn't have anything to stand on." (Depo., 125-26).[13]

The Seventh Amendment provides that in suits like this "the right of trial by jury shall be preserved,...." Of late, Justice Rehnquist has provided a most

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[13] Making adverse findings and inferences against plaintiff also was underscored by the district court's improper "findings" that "if plaintiff had not slept on his rights" and had "moved with greater dispatch to pursue the true reasons for his firing," the statute of limitations would not have run. The facts and circumstances do establish that Heideman did take action "to pursue the true reason for his firing," but he testified he was met with roadblocks and misdirections which caused him to remain "none-the-wiser" in believing he "had no recourse."

eloquent tribute to the "valued" and "fundamental" right to a jury trial in civil cases, in his dissent in Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 346 (1979):

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence ... any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

This Court's decisions reiterating the limitations on summary judgment, plus the earlier-cited cases from other circuits holding that tolling questions involve factual determinations, all establish that the conflicting evidence and inferences here should have been resolved by a jury. Certiorari must be granted to correct this glaring error.

III.

THIS COURT SHOULD AUTHORITATIVELY DECIDE THE PROPER REACH OF SUMMARY JUDGMENT WHEN IT IS URGED THAT THE STATUTE OF LIMITATIONS UNDER THE ADEA IS "EQUITABLY TOLLED" OR "EQUITABLE ESTOPPEL" SHOULD APPLY UNDER CIRCUMSTANCES SUCH AS ARE PRESENT HERE, AND SHOULD RESOLVE THE CLEAR CONFLICT AMONG CIRCUITS IN APPLICATION OF THE RULES OF TOLLING UNDER THE ADEA, AND INCONSISTENT APPLICATION OF RULE 56 ON SUMMARY JUDGMENT, SO AS TO AVOID THE GROSS MISCARRIAGE OF JUSTICE SUFFERED BY PETITIONERS.

A theme running through the Eight Circuit's and the district court's opinions is that because Mr. Heideman "made some efforts to determine the truth, including contacting an attorney," this somehow conclusively establishes that "Heideman had the means to get the truth he sought, but chose not to take advantage of the opportunity ...." Of course, this is in direct contrast to the law in Dartt v. Shell Oil, supra., and Meyer v. Riegel, supra., which soundly

reject any notion that contacting an attorney conclusively prevents a statute of limitations from being tolled. The judicial fiat by the district court and Eighth Circuit also begs the fundamental, material factual issue of whether Mr. Heideman exercised due diligence under all of the circumstances -- giving him the benefit of the doubt.

The only way the attorney could have helped Mr. Heideman determine the "true reason for his termination" would be to file a legal action against the employer. It is a material factual issue whether the attorney, had Mr. Heideman had the wherewithal to retain him, would have been able to uncover the "reprehensible scheme of discrimination," especially in view of the undisputed evidence that "PFL has attempted to conceal its discriminatory actions." (A16). The

burden should have been on defendant to show "conclusively" that Heideman could have discovered facts sufficient to timely file, if he had retained the attorney or otherwise pursued his inquiry. Instead, all doubts were resolved against him.

Interestingly, in Foster v. Johns-Manville Sales Corporation, 787 F.2d 390 (8th Cir. 1986), the author of the Eighth Circuit's opinion herein reversed summary judgment, where a statute of limitations defense raised what the court determined on appeal was the material factual issue:

> Whether in the exercise of reasonable diligence Mr. Foster should have known of the cause or his condition and of defendant's alleged wrongful acts in regard thereto more than two years before this action was filed.

787 F.2d, at 391. In Foster, the plaintiff knew he had asbestosis in 1972, yet did not file until years later. The

Eighth Circuit reversed summary judgment in language perfectly applicable to the Heideman case:

> Issues of due diligence and constructive knowledge depend on inferences drawn from the facts of each particular case .... When conflicting inferences can be drawn from the facts, summary judgment is inappropriate. Snyder v. United States, 717 F.2d 1193, 1195 (8th Cir. 1983). Whether in the exercise of reasonable diligence Mr. Foster should have known before March 12, 1980, the cause of his condition, and of defendant's wrongful acts in regard thereto, is a disputed factual issue properly left for the jury.

(Emphasis supplied). 787 F.2d, at 391. See also Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987).[14]

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[14] One of the cases cited against Mr. Hiedeman in the Eighth Circuit's opinion actually involved a question of tolling of the ADEA statute of limitations -- and the district court submitted the question to the jury for resolution, which is all Heidemans have been requesting from the very beginning. See Walker v. St. Anthony's Medical Center, 881 F.2d 554, 556-57 (8th Cir. 1989).

An important policy question is involved here: Does going to a lawyer because someone has a vague suspicion he is not being told the whole story conclusively begin the running of statutes of limitations? How can the Court of Appeals be allowed to jump to the conclusion that even if Heideman blindly had begun a lawsuit, that the Hill memorandum or other proof of age discrimination would have surfaced, so as to serve the humanitarian purpose of the ADEA to root out discrimination?[15] This Court, the court of last resort, must grant certiorari to review the generally important issues this case raises.

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[15] Again, it must be emphasized that the Hill memo was obtained from Larry Williams, who in turn obtained it from independent sources -- not from defendant in discovery. This important fact requires full development at trial, and not the "rush to judgment" apparent in this case.

IV.

THIS COURT SHOULD AUTHORITATIVELY DECIDE THE IMPORTANT POLICY QUESTION UNDER FEDERAL LAW OF WHETHER A PERSON CAN BE HELD CONCLUSIVELY ON "NOTICE" OF POTENTIAL CAUSES OF ACTION SO AS TO START THE RUNNING OF STATUTES OF LIMITATIONS, DESPITE DEFENDANT'S WRONGFUL CONCEALMENT AND MISDIRECTION REGARDING THE FACTUAL BASIS THEREOF, PARTICULARLY WHEN THE VICTIM INDISPUTABLY HAD NO SUSPICION WHATSOEVER THAT A VIOLATION OF LAW HAS OCCURRED, MAKES LIMITED INQUIRY INTO HIS RIGHTS, AND ACTS IN CONFORMITY WITH A LAWYER'S ADVICE THAT THERE IS NOTHING HE CAN DO. THIS COURT MUST AUTHORITATIVELY DECIDE WHETHER UNDER ALL CIRCUMSTANCES PETITIONER'S ACTIONS CAN BE DECLARED "UNREASONABLE" AS A MATTER OF FEDERAL LAW, OR WHETHER THE "REASONABLENESS" OF PETITIONER'S ACTION OR INACTION MORE PROPERLY MUST BE FOR A JURY TO DECIDE.

The Court of Appeals totally distorts petitioners' tolling argument:

> The Heidemans argue that PFL affirmatively concealed from Leo Heideman the reason for his discharge <u>because it did not tell him he was fired for being too old</u>.

(A15). This is a damaging distortion, and the opinion's phraseology is very telling in proving that the courts below

construed facts, inferences and arguments against the plaintiffs. The Court of Appeals' characterization is taken verbatim from defendant's characterization of the misconduct argument. It distorts what the Heidemans argued in such a way that one's first reaction is to say, "Of course, that's ridiculous, that cannot be the law or else everyone would be able to argue tolling ...." The Court goes on to state:

> Whether or not an employer tells its employee the true reason for the adverse employment decision is not the standard.

Agreed; for in the normal case, mere pretextual statements would not support equitable estoppel. But this is not the normal case, and the Heidemans did not argue below as the Court of Appeals characterizes. As pointed out earlier, where the Eighth Circuit goes completely

astray of the law and logic, is with its next statement:

> Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions.

(A16). All of the cases cited earlier are in utter conflict with this statement of law.

The answer to this subtle "opening of the flood gates" argument (which was made by the defendant and accepted by the district and appeals courts) is as follows: (1) First, whether to grant equitable relief from the statutory provisions is a matter that should be determined "on a case-by-case basis, depending on the equities of each case"; (A67, n. 17) (2) the floodgates sophistry fails because we have here "the rare case," where there is proof positive, not only of the plan to discriminate, but also the plan to mislead the employees

and conceal the discriminatory plan itself. In such case, the law, "the equities," and statutory policies strongly balance plaintiffs' way -- at least insofar as creating a genuine, material factual issue for trial; (3) because this is not the typical case of a plaintiff seeking to prove discrimination through circumstantial evidence and pretextual reasons for discharge, hoping to thereby "boot-strap" himself around late filing, the law of equitable estoppel properly requires plaintiffs to prove the plan to conceal. Most plaintiffs cannot; here, petitioners can, and should be allowed their day in court.

Under the proper standards for summary judgment it was impossible for the courts below to conclude that the evidence pointed all defendant's way on the factual issue of whether plaintiff

"actually relied" on the alleged statements and misrepresentations by the employer. Mr. Heideman testified that until he received the Hill memo in 1986, he did not believe he had any way to disprove what John Parr had told him as to the reasons for discharge. A jury certainly could reasonably conclude that Mr. Heideman ultimately did "reasonably rely" on the reasons given for this discharge, even though they "didn't make sense" and he "thought something was amiss," because he had been told that he "had no legal recourse," so that "there wasn't a damn thing" he could do.

In this age of Rule 11, important policy questions undercut the Court of Appeals' affirmance of summary judgment on the ERISA and state law claims, as well. On the ERISA claim, the Court of Appeals states that the cause of action

accrued when Heideman was terminated in 1979, because "the Heidemans were aware of all of the facts that would put reasonable persons on notice that they had an actionable claim."[16] (A22). On these "facts" the Court of Appeals holds the Heidemans should have had enough information to begin a lawsuit in 1979:

> They knew of their health problems, they understood that PFL was aware of their health problems, and they recognized that Leo Heideman had been fired without a legitimate reason.

(A22). The Heidemans' ERISA action is based on Section 510, making it illegal to fire employees to prevent them from receiving ERISA benefits. The Heidemans would have been promptly dismissed from court if they would have filed an action based on the flimsy "facts" the Eighth

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[16] Terms such as "reasonable persons" sound ringingly like issues for the finder of fact.

Circuit endorses in its opinion.[17] What was missing before receipt of the Hill memorandum was the first-time revelation of defendant's motive and attitude linking ill health in general to plaintiffs' "problem age group" which defendant secretly schemed to eliminate. Until that time, on the undisputed record, petitioners had no clue whatsoever of the defendant's wrongful "specific intent" which linked advancing age to susceptibility to injury, etc.

Certiorari must be granted to review the choice of law question, which is given short shrift by the Court of Appeals. This is a due process "minimum

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[17] Under the ERISA, a violation of Section 510 requires that the plaintiffs show "specific intent." See Dister v. Continental Group, Inc., 859 F.2d 1108 (2nd Cir. 1988) (summary judgment affirmed); Gavalik v. Continental Can Company, 812 F.2d 834, 851 (3rd Cir. 1987).

contacts" question, because plaintiff was only in Tennessee for a short period of time, and was fraudulently moved down there by defendant, who hoped he would quit.[18] The appeals court rejects the argument that the "smoking gun" memo affected the fraud claim, and in so doing the Court of Appeals either misstated or erroneously ignored the record:

> The district court has found, and we agree, that the cause of action accrued when Heideman was fired. He was then aware that he had been transferred and, in short order, fired, and that PFL knew he had refused previous promotion offers because he did not want to move from Kansas City. The memorandum told him nothing new that was relevant to

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[18] It was established in the record below that Mr. Heideman had turned down requests made several times during his career that he move to corporate headquarters in Duluth. That defendant hoped (or thought) Heideman would quit rather than accept the transfer is disclosed by the memo itself, in which Hill states that after the age of 50, a man "becomes a liability" in that he "becomes less responsive to job change, i.e. no more transfers, ..."

> his fraud claim; it did not even mention demotions or transfers.

(Emphasis supplied) (A26). Contrary to the Court of Appeals' "finding" of facts against Mr. Heideman, the memo provided the key missing element for fraud, proving that defendant knew it was lying to Heideman at the time defendant falsely told him he was being transferred to Memphis to build up the region, etc. After being fired a short time later, Mr. Heideman only knew that there had been a breach of Hill's promises. Until he received the memo, disclosing that Hill believed men in Heideman's age group were "less responsive to job change, i.e. no more transfers," a reasonable jury could conclude that Mr. Heideman did not until that time know that fraud had occurred. Under Missouri law, Mr. Heideman had a total of fifteen (15) years to file his

claim of fraud.[19] Where fraud is alleged, the due diligence requirement "does not go so far as to require the exhaustion of all available means to ascertain the truth" of the representations, "but demands reasonable care, which is a jury question." DeLong Equipment Company v. Washington Mills Abrasive Company, 887 F.2d 1499, 1519-20 (11th Cir. 1989). Missouri law likewise protects the victim of fraud. See Iota Management Corp. v. Boulevard Investment Company, 731 S.W.2d 391, 412-15 (Mo. App. 1987); Essex v. Getty Oil Company, 661 S.W.2d 544, 550 (Mo. App. 1983).

In short, the "smoking gun" memo not only goes to the merits of proving the

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[19] See Kansas City v. W. R. Grace & Co., 778 S.W.2d 264 (Mo. App. 1989) (Summary judgment reversed in a case involving statute of limitations issues, finding "a genuine issue of fact exists when there is the slightest doubt about a fact.")

discrimination, fraud and denial of benefits claims at issue, but undeniably also shows the clear intent to conceal the illegal plan from the victims, leading to logical and allowable inference -- totally ignored by the appeals court -- that suppression was intended to derail lawsuits. Should certiorari be granted on any question, petitioners urge a plenary review of the entire case.

CONCLUSION

The closing paragraph of the Court of Appeals' opinion indicates a belief that this case could be decided in the Heidemans' favor only based on "sympathy." Not so. The Heidemans' case is fully supported by "the rule of law" by which the Court of Appeals assertedly reaches its decision. Plainly and simply, petitioners are entitled under

law to have their day in court. They do not claim that their version of facts is the only version, but it has been shown that there are genuine factual disputes which can and must be resolved only by a true finder of fact. It is true that Congress has evinced a policy to resolve discrimination suits in a relatively short period of time, beginning with administrative filing and comtemplated concilation efforts. However, there is a built-in balancing of interests under the discrimination law, so that the Leo Heidemans of the world are not required to pursue difficult, expensive legal action with very little knowledge, scant resources, and only a vague suspicion that "something is amiss." Instead, bringing causes promptly is rightly outweighed by the more important public policy concern of assuring that the PFLs

of the world cannot violate the law with impunity. For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust
Building
922 Walnut Street
Kansas City, MO 64106
(816) 221-2288

Attorneys for Petitioners

TABLE OF CONTENTS TO APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-1645

Leo Heideman and Shirley Heideman,	*	
	*	
Appellants,	*	Appeal from
	*	the United
v.	*	States
	*	District
PFL, Inc.,	*	Court for
	*	the Western
Appellee.	*	District of
	*	Missouri.

Submitted: February 16, 1990

Filed: June 5, 1990

Before ARNOLD and BOWMAN, Circuit Judges, and STROM,* District Judge.

BOWMAN, Circuit Judge.

Leo and Shirley Heideman appeal from an

order of the District Court[1] granting summary judgment in favor of PFL, Inc., on the Heidemans' age discrimination claims relating to Leo Heideman's discharge by his employer PFL. Heideman v. PFL, Inc., 710 F. Supp. 711 (W.D. Mo. 1989). We affirm.

Leo Heideman, who was born in 1926, was employed by PFL,[2] a wholesale food distributor headquartered in Duluth, Minnesota, from 1964 until his discharge in 1979. During most of that time, his office was in his home in Kansas City.

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*The HONORABLE LYLE E. STROM, Chief Judge, United States District Court for the District of Nebraska, sitting by designation.

[1]The late Honorable John W. Oliver, Senior United States District Judge for the Western District of Missouri.

[2]At various times pertinent to this litigation, PFL's corporate name also has been Northland Foods, Inc., and Jeno's, Inc.

Late in 1978, at which time Heideman held the position of vice president of sales for the central division, he was informed by Carl Hill, PFL's senior vice president of marketing and sales, that, if he wished to stay with the company, he would have to take a demotion to the position of regional manager and immediately relocate to Memphis, Tennessee. His salary would not be cut. Heideman agreed, and was replaced by Ed Korkki, born in 1940. On June 1, 1979, soon after he moved permanently to Memphis, Heideman was fired. John Parr, the company's vice president of sales, told Heideman that he did not fit Carl Hill's plans. Heideman, dissatisfied with that explanation, wanted someone at PFL to tell him why he was fired. He attempted unsuccessfully to contact company executives, seeking clarification, wanted

someone at PFL to tell him why he was fired. He attempted tnsuccessfully to contact company executives, seeking clarification. He visited the offices of the National Labor Relations Board (NLRB) in Memphis, where he says he was told the company did not have to give him a reason for termination. Heideman claims that he was not told of the protection afforded employees over forty years old under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621-634. He also met with a Memphis lawyer, whose name Heideman does not recall. The lawyer confirmed that the law did not require PFL to give Heideman a reason for discharge. The lawyer offered to pursue the matter, but Heideman declined because of the cost. Heideman received a letter dated June 12, 1979, from Jeno Palucci, chairman of the

board of PFL, intimating that Heideman was fired because he had not worked hard enough. Heideman's pursuit of the truth ended there.

On August 29, 1986, having returned to Kansas City to live, Heideman received by mail a copy of a PFL memorandum dated December 21, 1978, a date just prior to his demotion. It was sent to him by Larry Williams, a former PFL employee who had successfully settled an age discrimination suit against PFL. This "smoking gun" memorandum, from Carl Hill to Dick Jones, president of PFL, described a policy designed to rid the company of older managers and articulated the characteristics that made such employees a liability to the company. It included a handwritten instruction (author not established) to "Read and destroy."

On September 5, 1986, Heideman filed a charge of age discrimination against PFL with the Equal Employment Opportunity Commission (EEOC). On November 25, 1987, the Heidemans filed suit in Jackson County, Missouri, Circuit Court. PFL removed the case to federal court.

The Heidemans' complaint sounded in five counts: one count each under the ADEA and the Employee Retirement Income Security Act (ERISA), and three state cnmmon law counts--fraud, intentional loss of consortium. The District Court, on motion of PFL, granted summary judgment in favor of the company on all counts, within the applicable statutes of limitations. The District Court also determined that equitable tolling to extend the limitations periods was inappropriate in this case. Although PFL's conduct toward Heideman and other

older employees appears to have been egregious, we find no error in the conclusions of the District Court.

The parties do not agree on the correct standard of review in this case. In connection with that difference of opinion, we have before us appellants' motion to strike, filed after oral argument, which we agreed to take with the case.

On February 15, 1990, one day before oral argument in this case, PFL submitted what it called a "supplemental letter brief." PFL indicated that it had misstated the applicable standard of appellate review in its main brief and suggested what it believes is the proper standard. On March 21, 1990, counsel for the Heidemans moved to strike that letter and asked us not to consider it. The unusual contention, in essence, is that

PFL's supplemental argument was neither raised nor considered below, so it should not be considered on appeal absent extraordinary circumstances. To our knowledge, no appellate court requires issues concerning its own standard of review to be raised in the trial court, and we find the suggestion that this is necessary to be entirely without merit. Appellants' motion is denied.

We are not persuaded, however, by the argument PFL makes in its supplemental brief. We review the grant of a motion for summary judgment under the same standard applied by the district court. McCuen v. Polk County, Iowa, 893 F.2d 172, 173 (8th Cir. 1990) (citing Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986)); Elbe v. Yankton Indep. School Dist. No. 1, 714 F.2d 848, 850 (8th Cir. 1983); see Fed. R. Civ. P. 56(c). To

affirm the district court "we must agree that there is no genuine issue of material fact, viewing the facts in the light most favorable to the nonmoving party, and that the moving party is entitled to judgment as a matter of law." McCuen, 893 F.2d at 173.

PFL's argument is that we should view the District Court proceeding in this case not as a hearing on a motion for summary judgment but as a trial on the factual issues of equitable tolling. See Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 718 (8th Cir. 1982). If we were to do so, we could not reverse unless we found the District Court's fact-finding to be clearly erroneous. Id. In Hrzenak, however, the authority upon which PFL bases its argument, this Court found that "both parties treated the proceeding as a trial on the factual

issues underlying [appellant's] claim for equitable tolling." Id. That is not the situation here. The fact that the parties here stipulated that depositions should be regarded as personal testimony under oath does not, as PFL suggests, convert argument on the summary judgment motion into a trial. At the oral argument of this appeal, counsel for the Heidemans emphasized that it was not his intent to waive jury trial on the issue of equitable tolling by defending against PFL's summary judgment motion, and there is nothing in the record to persuade us otherwise. We, therefore, will review this matter under the same summary judgment standard that the District Court used in reaching its decision.

In the order, the District Court made a thorough review of recent Supreme Court decisions dealing with Rule 56(c).

Heideman, 710 F. Supp. at 713-14; see Celotex Corp. v. Catrett, 477 U.S. 317, 322-27 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). To restate briefly the teaching of those cases, summary judgment is appropriate when there remains no genuine issue of material fact upon which a reasonable jury could find in favor of the nonmoving party. While the moving party on a motion for summary judgment is responsible for demonstrating to the court why there is no genuine issue of material fact, the nonmoving party must go beyond the face of his complaint to show that a rational jury could return a verdict in his favor. We hold, as did the District Court, that the Heidemans did not make a sufficient showing to

withstand PFL's motion for summary judgment on statute of limitations grounds.

Each of the counts in this suit is subject to a statutory limitations period.[3] As the District Court determined, and as we agree, the Heidemans filed their lawsuit outside the limitations period on all counts, and Leo Heideman's age discrimination charge with the EEOC, prerequisite to suit under the ADEA, was lodged well beyond the permitted 180 days after the discriminatory act. See 29 U.S.C. § 626(d) (1982). But because none of these

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[3]The District Court thoroughly and accurately discusses the applicable statutes. Although there is some disagreement, based on choice of law considerations, between the parties as to the correct statutes of limitations on the common law counts, we agree with the District Court's conclusions on all counts. See Heideman, 710 F. Supp. at 721-22.

statutes of limitations, including the 180-day limit under the ADEA, is jurisdictional, they all may be extended by equitable tolling. With respect to the ADEA, see EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 123-24 (1988) (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979)) ("[T]he filing provisions of the ADEA and Title VII are 'virtually in haec verba,' the former having been patterned after the latter."); Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC [under Title VII] is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."); see also Walker v. Saint Anthony's Medical Center, 881 F.2d 554,

556-57 (8th Cir. 1989) ("[T]he timely filing of a charge with the EEOC [under the ADEA] is not a jurisdictional requirement and is subject to waiver, estoppel and equitable tolling.")' DeBrunner v. Midway Equip. Co., 803 F.2d 950, 952 (8th Cir. 1986) ("The ADEA's 180-day filing requirement is in the nature of a statute of limitations and may be subject to equitable tolling.").

Turning to the ADEA count, it is uncontroverted that Heideman failed to file his EEOC charge within 180 days of the discriminatory act (his discharge), so we need to decide only whether summary judgment was appropriate on the issue of equitable tolling. We hold the District Court was correct in concluding that the Heidemans failed to come forward with facts that, if proved at trial, could support equitable tolling of the 180-day

limitations period.

Equitable tolling is appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands. Hill v. John Chezik Imports, 869 F2d 1122, 1124 (8th Cir. 1989) (Title VII case). "Equitable tolling arises upon some positive misconduct by the party against whom it is asserted." DeBrunner, 803 F.2d at 952 (ADEA case).

The Heidemans argue that PFL affirmatively concealed from Leo Heideman the reason for his discharge because it did not tell him he was fired for being too old. We have no doubt that is so. No employer is likely to admit to the disadvantaged employee a flagrant violation of a federal law against discrimination on the basis of age, race, or gender. Whether or not an employer

tells its employee the true reason for the adverse employment decision is not the standard. Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions. The Heidemans have not adduced facts to show that the delayed filing was "due to the employer's concealment, misrepresentation or failure to post adequate notice." Nielsen v. Western Electric Co., 603 F2d 741, 743 (8th Cir. 1979). There is nothing on the record to indicate that the company successfully misled heideman or prevented him from discovering or pursuing his rights under the ADEA. He concedes he was on notice from the very beginning that something was amiss. Indeed, Heideman has admitted repeatedly that he was certain at the time that he was not being told the true reason for his discharge. He

even made some efforts to determine the truth, including contacting an attorney. Although he knew that he was not told the truth about his discharge, he quit looking for the answer and allowed the limitations period to run.

A survey of ADEA cases from this circuit where issues relating to the equitable tolling of statutes of limitations were decided on defendants' motions for summary judgment convinces us that the District Court was correct in this case.

This Court upheld summary judgment on the equitable tolling issue in a case where the discharged employee was not told that his job was being eliminated and was told that his supervisors were seeking another position for him within the company. Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 288 (8th Cir.

1988). Here, Heideman was aware that, when he was demoted, he was replaced by Ed Korkki, who Heideman believed was fifteen to twenty years younger than himself. Heideman knew that PFL had fired him, and that the company did so without adequate time to evaluate -- and to find wanting -- his performance in his new position as regional manager. No one told him he would be assisted in finding another job with PFL so as to lead him to believe he was just being reassigned.

In DeBrunner, the employer had not posted the required notice concerning an employee's rights under the ADEA, see 29 U.S.C. § 627 (1982), but we affirmed summary judgment for the defendant because the discharged employee had a general awareness of his rights "or the means of obtaining such knowledge." DeBrunner, 803 F.2d at 952. In this

case, uncontroverted affidavits presented by PFL show that the company posted the statutory notice at its headquarters, and Heideman acknowledged trips to that location at least once per month. If he did not see the notice (he says he does not remember seeing it), that failure is not grounds for tolling the statute since he had "reasonable access" to the notice. Hrzenak, 682 F.2d at 718.

In another ADEA case, this Court found that the limitations period was not subject to tolling despite the employee's allegations "that he was unassisted by counsel, unable to find a lawyer, and unfamiliar with the legal process." James v. United States Postal Serv., 835 F.2d 1265, 1267 (8th Cir. 1988). Here, Heideman consulted a lawyer and declined the attorney's offer to pursue the matter further. Heideman had the means to get

the truth he sought, but chose not to take advantage of the opportunity because of the cost. The cost of engaging private legal services, however, does not justify equitable tolling. If it did, the 180-day limitations period would be rendered largely meaningless.

In yet another age discrimination case, this Court affirmed summary judgment for the employer where the fired employee argued that payment of severance benefits over a twenty-five-week period and the employer's offer of assistance in finding another job "lulled him into sleeping on his rights," but the employee presented no evidence of deliberate misconduct by the employer. Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358 (8th Cir.), cert. denied, 469 U.S. 1036 (1984). It is true that Heideman was told in a letter from Jeno Palucci that

he was not doing the job in a satisfactory manner. But Heideman says he knew that was not true and says he also was told he did not fit upper management's "plan." PFL did not prevent him from finding out the truth merely because it did not openly proclaim its master plan to fire older employees because of their ages.

We find no disputed issue of material fact on the equitable tolling issue, and we agree with the District Court that PFL was entitled to judgment as a matter of law. Summary judgment on the Heidemans' ADEA claim therefore is affirmed.

On the ERISA claim, interference with protected rights, 29 U.S.C. § 1140 (1982), the Heidemans argue that the cause of action did not arise until 1986 when they received the "smoking gun" memorandum. We disagree. The cause of

action accrued when Heideman was terminated in 1979. The gist of the Heidemans' claim is that Leo Heideman was discharged because, inter alia, PFL did not want to pay medical benefits to the couple. By the time Heideman was fired in 1979, the Heidemans were aware of all the facts that would put reasonable persons on notice that they had an actionable claim: they knew of their health problems, they understood that PFL was aware of their health problems, and they recognized that Leo Heideman had been fired without a legitimate reason.

Since ERISA does not have its own state of limitations, the court applies the most analogous state statute when determining whether a cause of action under the act is time-barred. See Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975), and cases cited

therein. Missouri's borrowing statute, Mo. Rev. Stat. § 516.190 (1986), which prohibits the bringing of actions barred by the laws of the state in which the actions originated, requires application of the (most analogous) Tennessee statute of limitations. The limitations period covering contracts is six years, Tenn. Code Ann. § 28-3-109 (Repl. 1980), and thus, as the District Court ruled, the ERISA claim is time-barred. The discussion concerning equitable tolling of the limitations period on the ADEA claim applies equally to the ERISA claim: the Heidemans have not come forward with any facts to create a jury issue on equitable tolling. Summary judgment on the ERISA claim is affirmed.

As for the common law tort claims, the thrust of the Heidemans' argument is that these causes of action did not accrue

until long after the 1979 termination. The Heidemans also dispute the District Court's choice of law. We agree with the District Court that Missouri's borrowing statute, Mo. Rev. Stat. § 516.190, brings these counts within the province of Tennessee law and thus subjects them to a one-year statute of limitations. Tenn. Code Ann. § 28-3-104(a) (Repl. 1980).[4] The tortious conduct complained of, the wrongful termination, occurred in Tennessee in 1979. The Heidemans' causes of action for emotional distress and loss of consortium accrued at that time, since the injuries resulting from the Tortious conduct would have appeared when PFL fired Leo Heideman or soon thereafter.

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[4] Even if Missouri's borrowing statute did not apply, the Heidemans' claims would be time-barred by the Missouri statute of limitations on torts of this nature (five years). Mo. Rev. Stat. § 516.120(4) (1986).

See Mackey v. Judy's Foods, Inc., 654 F. Supp. 1465, 1471 (M.D. Tenn. 1987) ("Under Tennessee law, a claim accrues when a plaintiff knows or reasonably should know that he has a cause of action against a defendant. A plaintiff is not permitted to wait, however, until he knows all of the injurious effects or consequences of a wrong."), aff'd, 867 F.2d 325 (6th Cir. 1989); Security Bank & Trust Co. v. Fabricating, Inc., 673 S.W.2d 860, 864-65 (Tenn. 1983), cert. denied, 469 U.S. 1038 (1984).

On the common law fraud count, Heideman argues that the fraud was perpetrated in the time period between his demotion and his termination: he was fraudulently induced to accept the transfer. He maintains that he did not discover the fraud until receipt of the "smoking gun" memorandum. The District Court found,

and we agree, that the cause of action accrued when Heideman was fired. He was then aware that he had been transferred and, in short order, fired, and that PFL knew he had refused previous promotion offers because he did not want to move from Kansas City. The memorandum told him nothing new that was relevant to his fraud claim; it did not even mention demotions or transfers. Heideman had five years to file his claim, Mo. Rev. Stat. § 516.120(5) (1986), and he failed to meet the deadline.[5]

The discussion concerning equitable tolling under the ADEA is also applicable

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[5] Under Missouri law, the cause of action for fraud will be "deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." Mo. Rev. Stat. § 516.120(5). Here, Heideman knew "the facts constituting the fraud" when he was discharged, thus subjecting his claim to the five-year limit. Id.

to the Heidemans' argument for equitable tolling of the statutes of limitations on the common law counts and need not be repeated. Summary judgment on the common law counts is affirmed.

Based on our review of the records, we agree with the District Court that PFL was entitled to summary judgment on all the Heidemans' claims. Although the law requires this result, our decision means only that the Heidemans waited too long to assert their claims. We in no way condone PFL's conduct. It is difficult to imagine a more offensive document in a case such as this than the "smoking gun" memorandum around which this cause of action centers, reproduced in Appendix A of the District Court's opinion. Heideman, 710 F. Supp. at 723-24. The memorandum evidences a deliberate and reprehensible company policy of

discrimination against its older employees. The document even goes so far as to recommend bonuses for the managers charged with the policy's implementation, payment of which presumably would depend upon their success in getting older employees out of PFL. But neither our compassion for the Heidemans nor the offensive nature of PFL's policy can create a fact issue on equitable tolling where no fact issue exists. "procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984) (equitable tolling denied in Title VII case where plaintiff failed to file suit within ninety days after receipt of right to sue letter). Courts are duty-bound to lay

aside their personal sympathies, even when they are not so vague, and to decide the cases that come before them in accordance with the rule of law. We do so here.

The judgment of the District Court is affirmed.

A true copy:

ATTEST:

CLERK U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1645WM

Leo Heideman and Shirley Heideman,	*	Order Denying Petition for Rehearing
Appellants,	*	and Suggestion for Rehearing
vs.	*	En Banc
PFL, INC.,	*	
Appellee.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 31, 1990

Order Entered at the Direct of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEO HEIDEMAN, et ux.,	:	
Plaintiffs,	:	
vs.	:	No. 88-0010-CV-W-JWO
PFL, INC.,	:	
Defendant.	:	

MEMORANDUM AND ORDERS ON MOTION FOR SUMMARY JUDGMENT

I

The above-captioned case pends on defendant's motion for summary judgment in which the defendant asserts that all five counts[1] of plaintiffs' complaint

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[1] Counts I alleges a violation of the Age Discrimination in Employment act of 1967, 29 U.S.C. § 621, et seq. (ADEA); Count II alleges a violation of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. (ERISA); Count III alleges fraudulent inducement to accept transfer to Memphis; Count IV alleges intentional infliction of emotional distress; and Count V alleges loss of consortium by Mrs. Heideman.

are barred by the applicable statute of limitations. Plaintiffs maintain that "[t]here are no statute of limitations issues in the instant litigation that properly may be resolved by summary judgment. Defendant has not carried its burden of showing that no genuine issue exists as to any material fact; to the contrary, plaintiffs have indicated the existence of substantial issues as to material facts on each of their causes of action." Plts' Memo in Oppos. to Deft's Motion for S.J. on Stat. of Limit. Issues at 12.

Pursuant to discussion at a pretrial conference held August 31, 1988, the parties agreed and the Court approved that the statute of limitations issues presented in defendant's pending motion for summary judgment should be separated for determination pursuant to Rule 42(b)

of the Federal Rules of Civil Procedure. An order to that effect was entered on August 31, 1988 and an agreed schedule of briefs for the presentation of the statute of limitations issues to this Court for resolution was established. The parties were also able to agree upon a partial stipulation of facts which was filed together with both parties' reports of facts each considered material to the statute of limitation issues to which the other was unwilling to stipulate.

This Court has reviewed those stipulations, defendant's motion for summary judgment, plaintiffs' opposition to defendant's motion for summary judgment, both defendant and plaintiffs' reports on the statute of limitation issues and defendant's reply brief together with all depositions and

exhibits submitted.[2]

We find and conclude that neither the principles of equitable estoppel nor equitable tolling can be said to toll the statute of limitation applicable to either plaintiffs' ADEA claim or to plaintiffs' ERISA claim. We further find and conclude that All three remaining State common law claims are also barred by the applicable statute of limitations. PLF's motion for summary judgment on Count I (ADEA claim), Count II (ERISA claim), and the three State claims (Counts III, IV, and V) will be granted because the charge for each count was not timely filed for the reasons set out

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[2] This includes the plaintiffs' supplementary affidavit filed February 8, 1989, defendant's reply to plaintiffs' supplementary affidavit filed February 21, 1989, and plaintiffs' reply to defendant's reply filed February 23, 1989.

below.[3]

II

Standard for Summary Judgment

The Supreme Court has recently decided three summary judgment cases, Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). This trilogy of cases clearly advocates a more liberal use of summary judgment. "Summary judgment procedure is

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[3] Both parties recognized that a decision in favor of the defendant on the statute of limitation issue would produce a harsh result. For there can be no doubt that if plaintiff had not slept on his rights and had moved with greater dispatch to pursue the true reason for his firing before the statute of limitations had run, plaintiff would have had an open and shut case of age discrimination. However, principles stated in Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) and in Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980), foreclose the determination of statute of limitation questions on the basis of sympathy.

properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327, quoting Fed. R. Civ. P. 1. See also City of Mt. Pleasant v. Associated Electric Corp., Inc., 838 F.2d 268, 273 (8th Cir. 1988) ("[A] trilogy of recent Supreme Court opinions demonstrates that [the Eighth Circuit] should be somewhat more hospitable to summary judgments than in the past. The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact.").

The purpose of summary judgment is "to

pierce the pleadings and to asses the proof in order to see whether there is a genuine need for trial." See Advisory Committee Notes to Rule 56. Summary judgment "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." Celotex, 477 U.S. at 327.

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law. [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.[4]

The Supreme Court has made clear that the "party seeking summary judgment

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[4] The "standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) ...." Anderson, 477 U.S. at 250. "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." Id. at 251, citing Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745, n. 11 (1983).

always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'[5] which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323. "Rule 56(e) [then] requires the nonmoving party to go beyond the pleadings and by her own affidavits or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324.

The nonmoving party cannot merely rest upon allegations and denials in his

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[5] The language "if any" is clear, "summary judgment may be made pursuant to Rule 56 'with or without supporting affidavits.'" Celotex, 477 U.S. at 324.

pleadings to get to the jury without any meaningful probative evidence that tends to support his complaint. Anderson, 477 U.S. at 248, citing First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S.253, 290 (1968). A genuine issue of material fact exists, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587, citing First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968).

It must be emphasized, however, that nothing in these most recent Supreme Court cases cited above negates the rule of law mandated by earlier cases that in

ruling on a motion for summary judgment, it is the court's duty to view the facts in the light most favorable to the nonmoving party and to allow that party the benefit of all reasonable inferences to be drawn from the evidence presented. Adickes v. S.H. Kress and Co., 398 U.S. 144, 157 (1970); Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727-28 (8th cir.), cert. denied, 444 U.S. 991 (1979). See also 6 J. Moore, Federal Practice ¶ 56.15[3] (2d ed. 1987).

III

Findings of Fact

The parties have stipulated to the following pertinent facts:

1. Plaintiff Leo Heideman (Mr. Heideman) was hired by defendant on or about July 12, 1964 as Regional Manager, North Central Region. Stip. ¶ 1.

2. Defendant is a Minnesota

corporation whose corporate name at all times pertinent to the instant litigation was Northland Foods, Inc.; Jeno's, Inc.; or PFL, Inc. Stip. ¶ 2.

3. In 1967, Mr. Heideman was promoted to the position of National Field Sales Supervisor and from 1970 to 1978 worked in several different management positions with defendant, as a vice president, the last of which was Vice President, Sales, for the Central Division of defendant. Stip. ¶ 5.

4. During the course of his employment with Jeno's, Inc., Mr. Heideman worked primarily out of his home in Kansas city, Missouri and traveled on a varying basis (approximately on a monthly basis) to the corporate headquarters of Jeno's, Inc., in Duluth, Minnesota. He would ordinarily stay in Duluth when making these visits, a day

and a night.

5. On or about December 6, 1978, Carl Hill (Mr. Hill) was employed by defendant as Senior Vice President, Marketing and Sales. He had previously been employed by defendant from about 1967 or 1968 until 1972. At the time he left defendant's employment in [1982], he was Executive Vice President of Marketing and Sales. Stip. ¶ 9.

6. On or about January 3, 1979, Mr. Hill's actual authority was made co-extensive with that of the then president of defendant, Dick Jones (Mr. Jones), and Mr. Hill reported directly to the chairman and vice chairman of defendant, not to Mr. Jones. Stip. ¶ 10.

7. On or about December 21, 1978, Mr. Hill wrote a confidential memorandum (the Hill memo) to Mr. Jones regarding what Mr. Hill referred to as "additional

responsibilities for Parr and Carpenter." Parr and Carpenter, as referred to in the Hill memo, were John Parr (Mr. Parr), then the Vice President of Sales of defendant, and Morris J. carpenter (Mr. carpenter), then the Vice President of Marketing of defendant, both of whom reported to Mr. Hill. Mr. Parr was then Mr. Heideman's immediate supervisor. Stip. ¶ 11.

8. Courtesy copies of the Hill memo[6] were directed to be delivered to Messrs. Parr, Carpenter, and Mick Paulucci (Mr. Paulucci). Mr. Paulucci was then the Vice Chairman of the Board of Directors of defendant. The document appended to this stipulation as "Exhibit A" appears to be a true copy of the courtesy copy of that memo delivered to

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[6] A copy of this memo is attached as Appendix A and incorporated herein by this reference in our findings of fact.

Mr. Carpenter; however, defendant does not know who made the handwritten comments thereon, nor when they were made. Stip. ¶ 12.

9. Mr. Hill admits that it is possible, but thinks it unlikely, that he wrote the following words in the upper right-hand corner of the first page of the Hill memo "Jay -- Read and Destroy." Stip. ¶ 13.

10. Around Christmas 1978, when Mr. Heideman was visiting defendant's office in Duluth, Minnesota, Mr. Hill called Mr. Heideman into Mr. Hill's office and advised Mr. Heideman that Mr. Heideman was being demoted from Vice President, Sales - Central Division, to Manager of the Memphis Region, that he was expected to build up the Memphis Region, that he would have to move immediately and take over this new responsibility, and that

Mr. Heideman would not receive any reduction in pay with respect to this demotion. Stip. ¶ 14.

11. After considering the proposed relocation to Memphis, Tennessee and demotion, and discussing the same with Mrs. Heideman, Mr. Heideman decided to accept the offered relocation and responsibility. Had he not accepted the offer, he would not have been able to continue his employment with defendant. Stip. ¶ 15.

12. Mr. Heideman was replaced as a vice president of defendant by Ed Korkki (Mr. Korkki). Mr. Korkki was born July 18, 1940. Stip. ¶ 16.

13. On or about June 1, 1979, Mr. Heideman was advised by Mr. parr by telephone that Mr. Heideman was being terminated, immediately. Stip. ¶ 18.

14. Mr. Heideman lived, worked, and

was in Tennessee at the time that he was terminated, and had been assigned to the Memphis territory for approximately five months. Mrs. Heideman also resided in Tennessee with her husband. Stip. ¶ 19.

15. Mr. Heideman, during his entire employment by defendant, never heard of any problems within defendant's nrganization concerning age discrimination. It never occurred to him, until he subsequently received a copy of the Hill memo in 1986, that he might have been the victim of age discrimination practices by defendant. Stip. ¶ 20.

16. At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to. Stip. ¶ 21.

17. Mr. Heideman suspected, after being notified of his termination, that he had been lied to by Mr. Hill when he was demoted and offered the position in Memphis, in that Mr. Hill then actually wanted to cause Mr. Heideman to voluntarily resign, or terminate him shortly after transferring him to the Memphis office, not have him build the Memphis Region. Mr. Heideman did not have any opinion or belief, however, as to the real reason he was terminated. Stip. ¶ 22.

18. Mr. Heideman visited a federal agency office in Memphis, Tennessee, which he believes to have been the National Labor Relations Board, in an effort to see if he could get some help in forcing defendant to tell him the reason for his termination. The agency representative with whom he met stated

that they were unable to help him, and referred him to a private attorney in Memphis. Mr. Heideman does not recall any mention made regarding age discrimination laws during his visit at the agency office. Stip. ¶ 23.

19. The same day Mr. Heideman visited the federal agency office, he visited with the attorney referred to him by the agency representative. The attorney advised Mr. Heideman that the employer did not have to give him a reason for termination, but could terminate him without a reason. The attorney offered to look into the matter if Mr. Heideman was willing to pay him $70 per hour. Under the circumstances, Mr. Heideman decided it did not make sense to employ the attorney, so he just dropped the matter. Mr. Heideman does not recall any mention made regarding age discrimination

laws during his visit with the attorney. Stip. ¶ 24.

20. Almost immediately after being advised by Mr. Parr that Mr. Heideman was terminated, Mr. and Mrs. Heideman decided to return to Kansas city. Thex sold their house in the Memphis area on or about August 1, 1979 and immediately moved back to Kansas City. Stip. ¶ 25.

21. On or about August 29 or August 30, 1986, Mr. Heideman received from Mr. Lawrence Williams (Mr. Williams) an unsolicited copy of the Hill memo. This was the first time Mr. Heideman suspected that he may have been the victim of age discrimination practices by defendant. Stip. ¶ 26.

22. Within two or three days after his receipt of the Hill memo, Mr. Heideman visited the Equal Employment Opportunity Commission (EEOC) office in Kansas city,

Missouri. Mr. Heideman filed a charge of discrimination with the EEOC on or about September 5, 1986. Stip. ¶ 27.

23. Mr. Heideman visited with one of his attorneys in the instant litigation, Mark J. Klein (Mr. Klein) on September 6, 1986, to determine if he had a right to private action against defendant arising out of defendant's actions. Stip. ¶ 28.

24. On August 23, 1986, before he had knowledge of the hill memo, Mr. Heideman wrote to Jeno Paulucci stating his belief that he "was moved for a reason then fired on purpose." Stip. ¶ 29.

25. Plaintiff filed suit in the Circuit Court of Jackson County, Missouri on November 25, 1987, and this action was subsequently moved to this Court on January 4, 1988. Stip. ¶ 30.

Under the procedures directed pursuant to this Court's August 31, 1988 order,

the parties also set forth those facts which they deemed material and in genuine issue in regard to the contentions made. We find and conclude that plaintiff has not presented any material facts in genuine issue for reasons that we state in the text to follow.

IV. **Analysis**

A. **ADEA Claim (Count I)**

In Count I of the complaint, plaintiffs allege that Mr. Heideman's termination from defendant's company which occurred Jund 1, 1979 (see Stip. 18) was in direct violation of ADEA in that plaintiff's firing was the result of a "blatant and outrageous scheme of age discrimination." Memo in Oppos. to Deft's Mot. for S.J. on Stat. of Limit. Issue at 1. Plaintiffs maintain that defendant fraudulently concealed the true reason why Mr. Heideman was fired from the plaintiff and

that they, "cannot be held barred from a cause of action." Id. "Plainly and simply, this case is about corporate concealment of illegal activity which, upon first discovery by the plaintiffs, was acted upon with immediacy. Contrary to defendant's arguments ... none of plaintiffs' claims are barred by applicable statute of limitations." Id. at 2.

In order for plaintiffs to prevail on Count I, they must have filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of alleged unlawful employment practice. 29 U.S.C. § 626(d).[7] Such a filing is a condition

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[7] 29 U.S.C. § 626(d) provides:

No Civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Opportunity Commission. Such a

precedent to later filing a suit under ADEA. Kriegesmann v. Barry-Wehmiller, 739 F.2d 357 (8th Cir. 1984), cert. denied, 469 U.S. 1036 (1984). Suit must be filed within two years of the alleged unlawful practice or within three years in the case of a willful violation. 29 U.S.C. § 626(e). The unlawful employment practice in this case occurred on June 1, 1979.[8]

In some circumstances, the 180-day filing period provided under ADEA may be equitably tolled. Zipes v. Trans World Airlines, Inc., 455 U.S.385, 393 (1982).

Two types of equitable tolling have

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charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred ....

[8] For a discussion of the Eighth Circuit's position on when the unlawful employment practice occurs and thus triggers the running of the statute, see Wilson v. Westinghouse Electric Corp., 838 F.2d 286, 288 (8th Cir. 1988).

been acknowledged by the courts: (1) equitable tolling which focuses on the plaintiff's excusable ignorance of the statue period (see Abbott v. Moore Business Forms, Inc., 439 F. Supp. 643, 646-49 (D.N.H. 1977); Wright v. State of Tennessee, 628 F.2d 949 (6th Cir. 1980)), and (2) equitable estoppel which tends to focus upon actions taken by the defendant (see Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977); see also Caudill v. Farmland Industries, Inc., 698 F. Supp. 1476 (W.D. Mo. 1988).

Plaintiffs here assert both grounds for tolling the statute of limitations -- that he was excusably ignorant of his cause of action because he did not see the posted notice of his ADEA rights, and that he was unaware of his claim because of the misconduct on the part of defendant in giving him a pretextual

reason for his termination. Similarly, because of defendant's misconduct, defendant should be estopped from asserting the statute of limitations as a defense.

Plaintiffs allege that they learned of the unlawful discrimination motive only upon receipt of a copy of the hill memorandum (see Appendix A) on August 29 or 30, 1986. "[I]t never occurred to Mr. Heideman, nor did he have any suspicion, until he received a copy [of the memo] ... that he might have been the victim of age discrimination ...." Memo in Oppos. to Deft's Mot. for S.J. on Stat. of Limit. Issue at 7.

The Eighth Circuit has given some guidance as to when such tolling can occur:

> The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is

> the consequence either of a deliberate design by the employer or of actions that the employer should unmistakenly have understood would cause the employee to delay filing his charge. Kriegesmann, 739 F.2d at 358-59, citing Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982).

Other circuits have similar guidelines.[9]

1. **Notice Posting**

Equitable tolling can occur if the

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[9] When the defendant wrongfully deceives or misleads the plaintiff in order to conceal the existence of a cause of action, the 180-day period will be tolled. English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987), cert. denied, 108 S.Ct. 2037 (1988) ("a time bar may be tolled on equitable grounds 'if the employee could show it was impossible for a reasonably prudent person to learn that his discharge was discriminatory'") (Id. at 1050) citing Miller v. International telephone and Telegraph corp., 755 F.2d 20, 24 (2d Cir.), cert. denied, 474 U.S. 851 (1985). See also Lawson v. Burlington Industries, 683 F.2d 862, 864 (4th Cir.), cert. denied, 459 U.S. 944 (1982); Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985); Coke v. General Adjustment Bureau, 640 F.2d 584, (5th Cir. 1981).

defendant fails to post the required notice setting forth employees' rights under ADEA. Kriegesmann, 739 F.2d at 358.

Defendant has offered the affidavits of Mr. Sprague[10] and Mr. Henningsgard[11] which state that the required ADEA notices were in fact posted in the company headquarters in Duluth.[12] The statement by Mr. Heideman that he never saw any kind of notice posted on a bulletin board or elsewhere in defendant's office or other facilities, concerning age discrimination laws (Plt's Depos. at 174), is not enough to toll the statute nor does it create a factual issue for trial. See Posey v. Skyline

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[10] Exhibit A of Deft's Mot. for S.J.

[11] Exhibit B of Deft's Mot. for S.J.

[12] Plaintiffs offer no evidence that such notices were not posted.

Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960 (1983) (employee's statement that he did not recall ever reading a notice of ADEA rights was insufficient to create a question of fact).

The fact that plaintiff worked primarily out of his home rather than out of a corporate office does not affect the tolling issue. Such a question was clearly answered in Hrzenak v. White-Westinghouse Appliance Co., 510 F.Supp. 1086, 1092 (W.D. Mo. 1981), aff'd, 682 F.2d 714, 718 (8th Cir. 1982). "[E]mployee's assertion that he never saw any notices should not of itself require tolling ...." Id. at 1092.

2. **Affirmative Misconduct**

We turn now to the question of whether the defendant engaged in any affirmative

misconduct[13] which would cause the

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[13] For examples of what type of misconduct is and is not sufficient to allow equitable estoppel or tolling see Wilson v. westinghouse Electric Corp., 838 F.2d 286 (8th Cir. 1988); English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir.), cert. denied, 103 S.Ct. 257 (1982) (summary judgment granted defendant -- no tolling where employee believed employer would eventually rehire him through no misconduct by employer); Price, 694 F.2d 963 (4th Cir. 1982); O'Malley v. GTE Service Corp., 758 F.2d 818 (2d Cir. 1985) (no affirmative misconduct found when employer delayed in sending certain retirement forms); Miller v. International Tel. & Tel. Corp., 755 F.2d 20 (2d Cir. 1985), cert. denied, 474 U.S. 851 (1985); Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45 (2d Cir. 1985) (tolling would occur while employee waits to see if employer honors promise of reinstatement); and see Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981); Ott v. Midland-Ross Corp., 600 F.2d 24 (6th Cir. 1979); Bonham v. Dresser Industries, Inc., 569 F.2d 187, (3d Cir. 1977), cert. denied, 439 U.S. 821 (1978); Glus v. Brooklyn Eastern District Terminal, 359 U.S.231 (1959) (defendant misled plaintiff as to necessity of filing claim); Atkins v. Union Pacific Ry. Co., 685 F.2d 1146 (9th Cir. 1982) (tolling occurred where defendant tells plaintiff he intends to settle dispute over termination).

plaintiff to delay filing his ADEA claim and subsequent suit and thus toll the limitations period. The statute will not be tolled unless the employer's failure to file in a timely manner is a consequence either of a deliberate design by the employer, or of actions that the employer should unmistakenly have understood would cause the employee to delay filing his charge. Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358-9 (8th Cir.), cert. denied, 469 U.S.1036 (1984).

Plaintiffs allege that the following facts when taken in combination amount to the requisite employer "deliberate design" which would result in equitable tolling of the statute under the test set forth in Kriegesmann. The fact that (1) Mr. Heideman was given a pretextual reason for his termination; (2) the hill

memo establishes an age discrimination policy; (3) there was an offer of an additional payment of $5,000 to Mr. Williams[14] if he would not circulate the Hill memo to anyone; and (4) Mr. Heideman was identified as one of the "middle-aged 'professional' sales managers" who Mr. Hill wanted replaced.[15] We find that none of these facts singly or in combination would justify tolling.

Plaintiff must come forward with evidence to show that what he was told by the defendant or actions taken by the defendant were intended to lull the plaintiff into sleeping on his rights and

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[14] Mr. Larry Williams was also an employee of defendant and he had timely filed an age discrimination lawsuit against the defendant which resulted in a $75,000 settlement.

[15] Mr. Williams testified in his deposition that he had at least two conversations with Mr. hill in which Mr. Heideman was so identified. Williams' Depos. 69-73.

he must show actual and reasonable reliance upon defendant's misconduct or representations. See Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981).

The fact that defendant may have misled the plaintiff as to why he was fired is not enough. Plaintiff must rely on those misrepresentations. "[T]he attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel." Kriegesman, 739 F.2d at 358.[16]

Mr. Heideman was told by Mr. parr that he was fired because he no longer fit

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[16] [T]he failure to tell plaintiff that he was demoted because of his age is not the type of deception or fraud that operates to toll the limitations period." Klausing v. Whirlpool Corp., 623 F.Supp. 156, 162 (S.D. Ohio 1985), appeal dismissed without opinion, 785 F.2d 309 (6th Cir. 1986).

into Mr. Hill's plans (Plt's Depos. at 82-85), however, plaintiffs' counsel states that Mr. Heideman never believed the reason given by Mr. Parr. "At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to." Stip. ¶ 21. In reply to the question "when did you first believe that Carl Hill had deceived you?" [about the reason given for termination], plaintiff replied, "five minutes after I hung up the phone ...." Plt's Depos. at 123. Mr. Heideman states that he felt he was "terminated for what I saw was totally unjustifiable reason, it just didn't make any sense ...." Id, at 84; "I was moved [transferred to Memphis] for a reason and then fired on purpose." Plt's Depos. at

121 referring to deft's Exh. 7. "I was deceived ...." Id. Mr. Heideman was so sure he had not been given the true reason that he went to what he now believes was the National Labor Relations Board to see if he cotld get help in finding out the true reason. Stip. ¶ 23.

Even before his termination, Mr. Heideman had misgivings about the way he was being treated by the defendant. Plaintiffs' counsel concedes that "Mr. Heideman was transferred by defendant to Memphis under circumstances Mr. Heideman considered extremely questionable ...." (Emphasis added). Plts' Report on Stat. of Limit. Issues at 6. Counsel further concedes in Stipulation 22 that Mr. Heideman did not believe the reason given by Mr. hill for his demotion and transfer to Memphis. At no time prior to his demotion was Mr. Heideman advised of any

complaints about his job performance. Plt's Depos. at 57-58, 143-44. At no time prior to his termination was Mr. Heideman advised of any complaints about his job performance. Id. at 77-82, 96.

Furthermore, Mr. Heideman visited an attorney concerning his termination to find out if he could somehow uncover the true reason for his termination but he decided "it did not make sense to employ the attorney, so he just dropped the matter." Stip. ¶ 24. Mr. Heideman was also aware that he was replaced by a man 15-20 years his junior, Mr. Korkki. Plt's Depos. at 141.

Equitable tolling results in a delay of the running of the statute of limitations until "'the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the

exercise of reasonable diligence after being apprised of sufficient facts to put him on notice.'" (Emphasis added). Cerone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985) citing City of detroit v. Brinnell Corp., 495 F.2d 448, 461 (2d Cir. 1974).

Given the foregoing facts and circumstances[17] surrounding Mr. Heideman's termination, we find and conclude that there were sufficient facts so that a reasonably diligent employee[18]

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[17] "Whether to grant equitable relief from the statutory provisions is a matter that should be determined 'on a case-by-case basis, depending on the equities in each case." Naton, 649 F.2d at 696 citing Hageman v. Philips Roxane Lab., Inc., 623 F.2d 1381, 1385-86 (9th Cir. 1980).

[18] The factual circumstances in Vaught v. R.R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984), are similar to the instant case. There the plaintiff knew he was demoted, knew he was replaced by a younger man and knew he had consistently obtained good job performance evaluations. The district

would have been put on notice of his cause of action. Therefore there is no justification for equitable tolling of the statute of limitations nor do the circumstances create a factual issue for trial.

Plaintiff Heideman urges this court to deny defendant's motion for summary judgment on the basis of material facts at issue and cites among others Meyer v. Riegel Products Corp., 720 F.2d 303 (3d Cir. 1983). In Meyer the court held that a summary judgment was not appropriate because a material question of fact existed for the jury to determine where plaintiff had a suspicion that he had not been given the true reason for dismissal and had consulted an attorney. The case

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court found that the statute began to run when he was aware of those facts listed above and not when he first learned that his employer had replaced most managers over 50 with younger men. Id at 410-11.

at hand presents many more factors to be considered than just suspicion and consultation -- enough factors which make it possible for this Court to conclude that summary judgment is appropriate.

In the instant case there is ample evidence that plaintiff did not rely upon the pretextual reason given, it was plaintiff's own lack of diligence that led him to the present impasse. Every such plaintiff has an affirmative duty to make inquiry about his legal rights and to pursue those rights with due diligence. See, e.g., United States v. Kubrick, 444 U.S.111 (1979); see also, Wehrman v. United States, 830 F.2d 1480, 1484 (8th Cir. 1987).

Based upon the foregoing analysis, we find and conclude that defendant's motion for summary judgment on Count I (ADEA claim) of plaintiff's complaint should be

and is hereby granted.

B. **ERISA Claim (Count II)**

Count II of plaintiffs' complaint alleges violations of Section 510 of ERISA (Interference with Protected Rights) and plaintiffs maintain that they are entitled to "relief under the provisions of 29 U.S.C. §§ 1132 and 1140 in that defendant's action in discharging Mr. Heideman had the purpose and effect of substantially decreasing Defendant's Retirement Plan benefits ...." Heideman Petition at 9..

ERISA itself does not contain a statute of limitations for the bringing of civil of civil action to recover benefits or to enforce rights under a pension plan. Therefore, the court must look to the most appropriate state statute of limitations. Johnson v. Railway Express Agency, 421 U.S.454, 462 (1975).

The choice of state law applicable here is either Tennessee or Missouri, however, the Court need not decide the choice of law question because under either state law, plaintiffs' cause of action is time-barred.[19]

The facts in this case are clear that there is no basis for equitable tolling of the applicable statute of limitations for the reasons given in the Court's earlier discussion of plaintiffs' ADEA claim.

For the reasons stated above, we find and conclude that defendant's motion for

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[19] Under Tennessee law an action under 29 U.S.C. § 1132 is governed by the six-year statute of limitations applicable to contracts. Tenn. Code Ann. § 28-3-109 (1980); Haynes v. O'Connell, 599 F.Supp. 59, 62 (E.D. Tenn. 1984). Under Missouri law an even shorter period of five years would apply. Mo. rev. Stat. § 516.120(1); Fogerty v. Metropolitan Life Ins. Co., 666 F.Supp. 167, 169 (E.D. Mo. 1987), aff'd, 850 F.2d 430 (8th Cir. 1988).

summary judgment on Count II (ERISA claim) of plaintiffs' complaint should be and is hereby granted.

C. State Common Law Claims

1. Intentional Infliction of Emotional Distress (Count IV) and Loss of Consortium (Count V)

Plaintiffs have a variety of theories under which they maintain that neither Missouri's five-year statute of limitations[20] nor Tennessee's one-year statute of limitations[21] defeats their claims in Counts IV and V.

First, plaintiffs argue that their

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[20] What actions within five years.

(4) An action for ... any other injury to the person or rights of another, not arising on contract ....

Mo. Rev. Stat. § 516.120.

[21] "Actions for libel, for injuries to the person, false imprisonment, malicious persecution, ... shall be commenced within one (1) year after cause of action accrued." Tenn. Code Ann. § 28-3-104(a).

cause of action did not accrue at the time of plaintiff's termination in July 1979 but that their cause of action arose when they received the Hill memorandum on August 29 or 30, 1986. Plaintiffs argue that their cause of action was fraudulently concealed from them and that Mo. Rev. Stat. § 516.280 applies "[i]f any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such an action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented.

Second, plaintiffs argue that their cause of action did not arise until later than 1979. Plaintiffs cite Mo. Rev. Stat. § 516.100 "[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of

contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained." Plaintiffs maintain that the last item of damage occurred in 1984 while plaintiff was living in Missouri when plaintiff began losing his sight or at some unspecified future date when his emotional distress began to subside, also while plaintiff resided in Missouri.

Thirdly, plaintiffs contend that defendant should be equitably estopped from pleading Tennessee's one-year statute of limitations because plaintiffs were long-established Missouri residents and only were located in Tennessee for a few months and then only because

defendant induced them to move to Tennessee.

Defendant maintains that both counts are barred by Missouri's borrowing statute, Mo. Rev. Stat. § 516.190 (1989 Supp.) which states: "Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." Since Counts IV and V are personal injury torts which arose in Tennessee, they are governed by Tennessee law.

> Actions for libel, for injuries to the person, false imprisonment, malicious persecution ... shall be commenced within one (1) year after the cause of action accrued.

Tenn. Code Ann. § 28-3-104(a) (1980).

For the reasons set forth below, we find and conclude that plaintiffs' Count

IV and Count V both are time-barred by the Missouri borrowing statute.

The Eighth Circuit has made clear that "[t]he plain meaning of the [borrowing] statute in question is that where the tort takes place in a foreign jurisdiction, Missouri will adopt the statute of limitations of that jurisdiction barring the cause of action." McIndoo v. Burnett, 494 F.2d 1311, 1313 (8th Cir. 1974). In the instant case, the tortious conduct -- the termination of plaintiff -- took place in Tennessee. Stip. ¶ 18.[22] The plaintiff

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[22] The fact that plaintiff was called by phone from Duluth and informed he was terminated does not affect the determination that the tort took place in Tennessee. The cause of action for an injury to an individual occurs where that individual was located at the time of the injury. Electric Theater Co. v. Twentieth Century-Fox Film Corp., 113 F.Supp. 937 (W.D. Mo. 1953). See also Western Newspaper Union v. Woodward, 133 F.Supp. 17 (W.D. Mo. 1955) (It is the general law ... that in tort actions

resided in Tennessee at the time of the wrongful termination. The injuries sustained by the plaintiff occurred in Tennessee when he was terminated and not at some later date as plaintiff maintains.

2. Fraudulent Inducement to Accept Transfer to Memphis, Tennessee (Count III)

Plaintiffs' final count is based on the same set of allegations as plaintiff maintains in his ADEA claim earlier discussed. Plaintiff contends that defendant defrauded him into transferring to Memphis, Tennessee and then terminated him due to his age. Complaint ¶¶ 35, 37; Plt's Depos. at 147. Plaintiff argues that this fraud began in December 1978 when he was offered the transfer and

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governed by state law, the law of the state in which the injury or loss was suffered and which, hence created the right, governs the tort ...." Id. at 23.

ended when he was terminated in June 1979. Plaintiff states, however, that the fraud was not discovered until August 1986 upon receipt of the Hill memo and thus plaintiff may take advantage of Mo. Rev. Stat. § 516.120(5): "An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting fraud."

Here plaintiffs' argument fails as it has previously failed. This cause of action began to run upon plaintiff's termination in 1979. At which time he felt "deceived" about his transfer. Plt's Depos. at 84. Further evidence of when a reasonable person would have been aware of the facts constituting fraud have been previously dealt with in this

memorandum and order and will not be reiterated here.

It is therefore

ORDERED (1) that defendant's motion for summary judgment on Counts I, II, III, IV, and V should be and the same is hereby granted. It is further

ORDERED (2) that the Clerk of this Court shall enter final judgment in favor of defendant and against plaintiff in accordance with Rule 58 of the Federal Rules of Civil Procedure.

/s/ John W. Oliver
Senior Judge

Kansas City, Missouri
April 11, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

	Civ. File Nos.
Richard McFadden	5-88-0183
Donald I. Fifield,	5-88-0183
Ronald Schermerhorn	5-88-0184
Frank Faso, and	5-89-015
William Brand,	5-89-051

Plaintiffs,

v. ORDER

ETOR Properties Limited Partnership, successor to P.F.L., Inc. and Jeno's, Inc., formerly Known as Jeno's, Inc., a Minnesota corporation,

Defendants.

David P. Sullivan, Esq., Sullivan & Setterlund, Ltd., 825 Alworth Building, Duluth, MN 55802, for the plaintiffs.

Peter Dorsey, Esq., John M. Mason, Esq., George A. Koeck, Esq., Dorsey & Whitney, 2200 First Bank Place East, Minneapolis, MN 55402, for the defendant.

This matter is before the court upon defendants' motion for summary judgment on all of plainthffs' claims. For the

reasons set forth below, the court denies defendants' motion.

Factual Background

In this action plaintiffs Richard McFadden, Donald I. Fifield, Ronald Schermerhorn, Frank Faso and William brand allege that the termination of their employment with defendant Jeno's, Inc. (Jeno's) violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq, the Employee Retirement Income Security act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and, as to plaintiffs McFadden and Faso, the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363.02 et seq. Plaintiffs have also named as defendants ETOR Properties Limited Partnership (ETOR) and P.F.L., Inc. (PFL), the successors to Jeno's.

Jeno's employed each of the plaintiffs

in its sales and marketing division as regional sales managers. Plaintiffs were responsible for selling Jeno's frozen pizza product line to food brokers in plaintiffs' respective regions. Jeno's terminated each plaintiff on the following dates:

McFadden	October 24, 1981, age 41
Fifield	June 7, 1979 at age 57
Schermerhorn	June 7, 1979 at age 43
Faso	April of 1982 at age 59
Brand	Jan. 2 or 3, '79 at 45

The sole basis for plaintiffs' discrimination claims is a December 21, 0978 memorandum from Carl Hill to Dick Jones with copies to John Parr, Jay Carpenter and Mick Paulucci (the Hill Memorandum). Each of these recipients, as well as the author, was an officer or manager at Jeno's at the time. A handwritten note in the upper right-hand corner of the memorandum states, "Jay - Read and Destroy." A copy of the

memorandum is attached as Exhibit A to this opinion. Each plaintiff became aware of the hill memorandum during or after December of 1987.

Defendants challenge plaintiffs' claims on statute of limitations grounds. Consequently, the termination dates, the circumstances surrounding each termination, and the dates on which each plaintiff became aware of the Hill memorandum are all important factors to be considered.

According to plaintiffs, Jeno's business was characterized by an aggressive management style and frequent turnovers of the work force. Employees were often fired with little notice or explanation. Management allegedly was encouraged to fire regional managers on a regular basis in order to keep everyone "on their toes." Plaintiffs contend that

this working environment, along with Jeno's representations to them, led them to believe that they were no different from anyone else who had been fired. In short, plaintiffs claim that they were lured into believing that age was not a factor in their terminations.

In particular, each plaintiff believed that either his actions, or business conditions generally, compelled his own termination. In the case of Schermerhorn and Brand, Jeno's management allegedly cited shortcomings in their performance as the reason for their terminations. Shortly before his discharge, Schermerhorn had been severely reprimanded by Hill for scheduling an important meeting in a room that was too small. When Schermerhorn inquired about the reason for his discharge, he was told that "Carl Hill wants it that way."

Consequently, Schermerhorn assumed that his firing stemmed from his conflict with Hill. After Brand's termination, Carpenter cited problems related to Brand's communication with the marketing department. Brand also had refused a transfer to Duluth and was told by Hill that his future with the company was in jeopardy as a result.

McFadden, Fifield and Faso each thought that Jeno's terminated them as part of a departmental reorganization. They had been informed that business was down in their regions and that a change in personnel was necessary. None of the plaintiffs suspected that age discrimination had played a role in their terminations.

The plaintiffs first suspected that they were victims of discrimination when they received or heard about the Hill

memorandum. According to plaintiffs' testimony, they first became aware of the memorandum, filed charges with the Equal Employment Opportunity Commission (EEOC) and state agencies, and initiated civil actions on the following dates:

	Aware of Memo	Charge date	Action filed
McFadden	12/87	4/20/88	9/1/88
Fifield	1/88	4/20/88	9/1/88
Schermerhorn	12/87	4/20/88	9/1/88
Faso	12/87	8/29/88	1/27/89
Brand	7/88	12/16/88	3/15/89

Defendants challenge plaintiffs' claims on two grounds. First, defendants argue that plaintiffs failed to file EEOC charges within the statutory time period. Second, plaintiffs' ADEA claims, and their ERISA and MHRA claims, are barred by the applicable statutes of limitations. Plaintiffs respond that the ADEA filing requirements and the statutes of limitations were tolled by defendants'

actions.

Analysis

In deciding defendants' motion for summary judgment the court must apply the standards sdt forth in Fed. R. Civ. P.56(c). The defendants bear the initial burden of informing the court of the basis for their motion, and of identifying those portions of the pleadings, depositions, and affidavits which they believe demonstrate the absence of a genuine issue of material fact. Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986). In order to defeat the motion, plaintiffs must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The judge's function at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Id. at 249.

As a prerequisite to commencing a civil action, an ADEA plaintiff must file a charge with the EEOC alleging discrimination. In a state which has its own discrimination laws, a so-called "referral state," the charge must be filed "within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier." 29 U.S.C. § 626(d) and § 633(b). E.E.O.C. v. Commercial Office Products Co., 486 U.S. 107, 108 S.Ct. 1666, 1675-76 (1988) (300 day period applies to

Title VII claim regardless of whether claim falls within state limitations period); E.E.O.C. v. Shamrock Optical Co., 788 F.2d 491, 493-94 (8th Cir. 1986) (same); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-56 (1979) (Title VII and ADEA are parallel provisions subject to similar interpretation). Minnesota is a referral state. Therefore the 300-day filing requirement, rather than 180-day limitation as urged by defendants, applies to plaintiffs' claims. ADEA claims are also subject to a two-year statute of limitations or three years for willful violations. 29 U.S.C. § 626(e)(1) and 29 U.S.C. § 255(a).

In the case at hand none of the plaintiffs' EEOC charges were filed within 300 days of plaintiffs' respective terminations. Similarly, none of plaintiffs' civil actions were commenced

within either two or three years of the time each of them was fired. EEOC charges were filed within 300 dams after each plaintiff became aware of the Hill memorandum, however, and each plaintiff's action was brought within two years of the discovery date as well. Unless the applicable time limitations are tolled from the date of termination until the time of discovering the Hill memorandum, plaintiffs' ADEA claims are clearly time-barred.

Since the Supreme Court resolved a split among the circuits in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1984), the charge filing requirements of Title VII and the ADEA, as well as the corresponding statutes of limitations, have been subject to equitable tolling. Even before Zipes, the Eighth Circuit allowed tolling. In

Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358-59 (8th Cir. 1984), cert. denied, 469 U.S.1036 (1984) the court held that the ADEA

> will not be tolled on the basis of equitable estoppel unless the employee's failure to file in a timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.

(quoting Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982)). The Eighth Circuit recently quoted the same passage with approval in Walker v. St. Anthony's Medical center, 881 F.2d 554, 557 (8th Cir. 1989). Courts have also allowed tolling in cases where the plaintiff demonstrated excusable ignorance of the statutory period. See Abbott v. Loore Business Forms, Inc., 439 F. Supp. 643, 646-49 (D. N.H. 1977); Wright v. State of Tennessee,

628 F.2d 949 (6th Cir. 1980). However, the latter reason for tolling has not been cited by the plaintiffs in this case.

In Heideman v. PFL, Inc., 710 F.Supp. 711 (W.D. Mo. 1989), the district court rejected a tolling argument similar to the one asserted by plaintiffs in this case. There the plaintiff, Leo Heideman, was terminated from Jeno's at about the same time as plaintiffs in the case at hand. Heideman filed a charge of discrimination with the EEOC over six years after his termination and brought a civil action over a year after the charge. The court granted summary judgment for PFL, Inc., finding that Heideman's claims were time-barred. Defendants contend that Heideman is indistinguishable from the instant case and that plaintiffs' claims should

therefore be dismissed.

The court in Heideman found that the plaintiff failed to carry the two-part burden necessary for equitable tolling. The court explained that "[p]laintiff must come forward with evidence to show that what he was told by the defendant or actions taken by the defendant were intended to lull the plaintiff into sleeping on his rights and he must show actual and reasonable reliance upon defendant's misconduct or representations." Id. at 719. The court emphasized the second aspect of the burden. "The fact that defendant may have misled the plaintiff as to why he was fired is not enough. Plaintiff must rely on those representations." Id.

The Hill memorandum provides strong evidence that Jeno's not only had a policy of discriminating against older

employees, but that Jeno's management took steps to conceal its policy. The memorandum describes a number of problems associated with "middle-aged people." Specifically, it states that "[a]fter the age of 50 a man becomes a liability in two ways: a. He can't find a job anywhere else and we are married to him until retirement. b. He becomes less responsive to job change, i.e. no more transfers, no additional challenges." Hill then lays out a strategy for building an effective sales force:

> We need to create a field sales force that consists of men between 25 and 45 who are highly motivated by bonuses and trying to make their mark on the world. If done properly this would create a situation in which we had strong young regional management, highly motivated, constantly "pushing" for promotion, and in general striving for the goal of success.

For tolling purposes the following passages of the memorandum are

instructive.

> If by some chance we have men approaching the "problem age" we should be willing and ready to help those men move on by making their exit from Jeno's a comfortable one. This would be accomplished by having a frank discussinn with a man between '45 and 50 and telling him his future at Jeno's is limited and that it would be advisable for him to look for work elsewhere.
>
> * * *
>
> No one needs to be the wiser and we would then be able to re-orient that region with younger more motivatable personnel.

This language at least creates a genuine issue of material fact with respect to the existence of a deliberate design by the employer to prevent plaintiffs from filing a timely discrimination charge. The note on the memorandum to "read and destroy" the document supports this conclusion.

The court's ruling in Heideman is not to the contrary. The court did not rule that Heideman failed to show a deliberate

design. Rather, the court concluded, based on the stipulated record, that Heideman never relied on actions or representations by the defendant. "At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to." Heideman, 710 F.Supp. at 719. In fact, "Mr. Heideman was so sure he had not been given the true reason [for his termination] that he went to what he now believes was the National Labor Relations Board to see if he could get help in finding out the true reason." Id. Accordingly, the court found "ample evidence the plaintiff did not rely upon the pretextual reason given." Id. at 720.

The case of Klausing v. Whirlpool

Corp., 623 F.Supp. 156 (D. Ohio 1985) is distinguishable for the same reason. In Klausing the court stated, "It is clear from the record, and plaintiff candidly admits, that he at least suspected that he was demoted because of his age." Id. at 162. Thus plaintiff could not have relied on any conduct or misrepresentations that would require tolling.

The Fifth Circuit case of Blumberg v. HCA Management Co., Inc., 848 F.2d 642 (5th Cir. 1988), cert. denied, 109 S.Ct. 789, supports defendants' argument. Based on the trial record, the court found that the plaintiff should have been on notice of any possible discrimination at the time of discharge. This conclusion was warranted because the plaintiff "was advised at the time of her termination that she was being discharged

for cause, and she was able to evaluate the propriety of the reasons for her dismissal immediately." Id. at 645. Blumberg is not controlling in the instant case, however, because the record is not sufficiently developed for the court to make the kind of determinations that the trial court in Blumberg made. At the summary judgment stage the court is compelled to view the record in the light most favorable to the nonmoving party. Having done so, the court is unable to say that no issues of material fact remain to prevent defendants from being entitled to judgment.

The same principles apply to the plaintiffs' claims under ERISA and the MHRA. The statutes of limitations applicable to both types of claims are subject to equitable tolling. Prior to 1981, the MHRA contained a six-month

filing requirement that operated as a jurisdictional prerequisite. However, after amendments in 1981 the MHRA filing requirements became subject to tolling in the same manner as those of Title VII and the ADEA. Carlson v. Independent School Dist. No. 623, 392 N.W.2d 216 (Minn. 1986). Thus McFadden and Faso, who were discharged in 1981 and 1982 respectively, may maintain their MHRA claims.

Accordingly, IT IS HEREBY ORDERED that defendants' motion for summary judgment is DENIED.

Dated: December 21, 1989.

/s/ Paul A. Magnuson
United States District Court
Judge

(2)

No. 90-696

In The

Supreme Court of the United States

October Term, 1990

LEO HEIDEMAN AND SHIRLEY HEIDEMAN,

Petitioners,

vs.

PFL, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN F. WYMER, III
Counsel of Record
JONES, DAY, REAVIS & POGUE
3300 First Atlanta Tower
Atlanta, GA 30383-3101
(404) 521-3939

DEBORAH A. SUDBURY
JONES, DAY, REAVIS & POGUE
3300 First Atlanta Tower
Atlanta, GA 30383-3101
(404) 521-3939

R. HARRIS TURNER
2233 Lee Road, Suite 101
Winter Park, FL 32789

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether "special and important" reasons exist for granting a writ of certiorari in this matter?

2. Whether the Eighth Circuit properly affirmed the grant of summary judgment on the grounds that Mr. Heideman's claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (1982 & Supp. V 1987) was untimely?

3. Whether the Eighth Circuit properly affirmed the grant of summary judgment on the grounds that Mr. Heideman's claim under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1989) and Petitioners' state law claims were untimely?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS TO APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent PFL, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Writ"), seeking review of the Eighth Circuit's opinion dismissing Petitioners' appeal of the District Court's grant of summary judgment in this case under Federal Rule of Civil Procedure 56(c).

OPINIONS BELOW

The decision of the Court of Appeals is reported at 904 F.2d 1262 (8th Cir. 1990) and is set out in Petitioners'

Appendix at A1-13. The unpublished order denying rehearing is set out at page A30 of Petitioners' Appendix. The district court's opinion of April 11, 1989 is reported at 710 F. Supp. 711 (W.D. Mo. 1989), and is set out in Petitioners' Appendix at A31-79. The district court's Pretrial Conference Order is set out in Respondent's Appendix at A1-3. The stipulation of facts upon which summary judgment was granted is in Respondent's Appendix at A4-13.

JURISDICTIONAL STATEMENT

Petitioners purport to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those set forth by Petitioners in the Writ, the following statutes are germane to the Writ.

Federal Rule of Civil Procedure 42(b) provides in relevant part:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Federal Rule of Civil Procedure 52(a) provides:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Petitioners Leo and Shirley Heideman (collectively "Petitioners") request a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on the Eighth Circuit's affirmance of the District Court's Order of April 11, 1989 granting summary judgment to Respondent PFL, Inc. ("PFL", "Jeno's" or "the Company").

Petitioner Leo Heideman ("Heideman") was discharged from his job as Regional Manager of Jeno's, Inc.

in June, 1979. On November 25, 1987, more than 8 years after his discharge, Heideman, joined by his wife, filed a five count complaint against PFL, Inc. Count I of the complaint alleged that Heideman was discharged because of his age in violation ofthe Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987) ("ADEA"). Count II of the complaint alleged that Heideman was discharged in violation of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1989). Counts III and IV of the complaint are claims for fraud and the intentional infliction of emotional distress. In Count V, Mrs. Heideman asserts a claim for loss of consortium.

1. The Proceedings Below

On August 24, 1988, Respondent filed its motion for summary judgment contending that Petitioners' claims were barred by the applicable statutes of limitations and also that several of the claims were substantively deficient. On August 31, 1988, the district court entered an Order pursuant to Fed. R. Civ. Proc. 42(b) separating out for independent adjudication the statute of limitations issues presented by Respondent's motion for summary judgment. (Respondent's A1-3). The court also directed the parties to attempt to agree upon a stipulation of facts to be used in deciding Respondent's motion for summary judgment. (Respondent's A1, ¶ 2(a)). Pursuant to the district court's order, the parties stipulated to virtually all of the facts material to the statute of limitations questions. (Respondent's A4-13). The parties then executed

and filed that stipulation of facts to be used by the district judge in ruling on the summary judgment motion. (Respondent's A4-13).

On April 11, 1989, the district court entered an Order granting PFL's motion for summary judgment and dismissing all of Petitioners' claims. (Petitioners' A13). In granting the motion, the district court relied on the stipulated facts which, by definition, were not in dispute. (Petitioners' A31-79).

Petitioners appealed that Order to the Eighth Circuit. The Eighth Circuit panel unanimously affirmed the district court's grant of summary judgment. (Petitioners' A1). Petitioners' motion for rehearing in the Eighth Circuit was denied. (Petitioners' A30).

2. The Facts

The relevant facts can be stated briefly. Heideman was hired by Jeno's in 1964 as a Regional Sales Manager in Kansas City, Missouri. (Respondent's A4, ¶ 1). Heideman's performance was generally satisfactory during his early years with the Company and accordingly, he was promoted to various positions within the Company. (Respondent's A5, ¶ 5). During the course of his employment with Jeno's, Heideman worked primarily out of his home in Kansas City, Missouri although he frequently traveled to the Company's corporate headquarters in Duluth, Minnesota. (Respondent's A5, ¶ 7).

In December, 1978, during one of Heideman's visits to the Company headquarters, Heideman was notified that he was being demoted and reassigned to the position

of Regional Manager in Memphis, Tennessee. (Respondent's A7, ¶ 14). At the time of the demotion, Heideman was replaced in Kansas City by Ed Korkki, who Heideman believed was 10 to 15 years younger than himself. (Respondent's A8, ¶ 16). Approximately six months later, in June, 1979, Heideman was discharged as Regional Manager in Memphis, Tennessee. John Parr, the Company's Executive Vice President for Marketing and Sales, notified Heideman of his discharge. (Respondent's A8, ¶ 18).

Parr told Heideman he was being fired because "he did not fit into Carl Hill's plans." (Petitioners' A3). In a letter dated twelve days after Heideman's discharge, the Chairman of Jeno's, Jeno Paulucci, indicated that Heideman had been fired because he had not worked hard enough. (Petitioners' A4-5). Heideman strongly disagreed with that assertion because, in his words, they were not "too many people that worked any longer hours or harder than [he] did." (Heideman Depo. p. 93).

Heideman felt that he had not been told the "real reason" for his separation, "and that he was being lied to." (*See* Respondent's A9, ¶ ¶ 21-22, Heideman Depo. p. 123). Heideman further believed that he had been lied to back when Carl Hill (another member of Jeno's management) had told Heideman at the time of his transfer that he (Hill) wanted Heideman to build the Memphis region. (*See* Respondent's A9, ¶ ¶ 21-22; Heideman Depo. p. 122). Heideman felt that he had been "moved and deceived" because Carl Hill "never had any intention of keeping [him]," but rather had all along intended to terminate Heideman shortly after transferring him to Memphis. (Heideman Depo. p. 122).

Shortly after his discharge, Heideman contacted an attorney in Memphis to ascertain what his legal rights were. He also visited the Memphis office of a federal agency that Heideman thinks was the National Labor Relations Board. (Respondent's A9-10, ¶ ¶ 23-24). Although the attorney offered to look into the situation, Heideman decided not to pursue the matter further primarily because of the cost involved in retaining an attorney. (Respondent's A10, ¶ 24).

Some seven years later, in August, 1986, Heideman received a call from Lawrence F. Williams, another former employee of Jeno's. (Respondent's A10, ¶ 26). Williams had previously filed suit against Jeno's in federal court in Atlanta, Georgia, alleging that he, too, had been discharged because of his age. Williams forwarded to Heideman a memorandum written by Carl Hill dated December 21, 1978, expressing a preference for younger workers ("Hill memorandum") (Respondent's A10, ¶ 26).

After receiving the Hill memorandum, Heideman filed a charge of age discrimination with the U.S. Equal Employment Opportunity Commission. (Respondent's A10-11, ¶ 27). On November 25, 1987, over eight years after his termination (and nearly 15 months after receiving the Hill memorandum), Heideman and his wife filed the suit which is the subject of this case. (Respondent's A12, ¶ 30).

SUMMARY OF THE ARGUMENT

As this Court recently recognized, harsh facts have the potential to result in bad law:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law- . . . compel[s] the result.

Texas v. Johnson, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring). The offensive nature of the Hill memorandum will engender little sympathy for Respondent. Nevertheless, the courts below were correct in recognizing that Petitioners' claims were untimely and that judgment in Respondent's favor was the only legally correct result.

Other than the offensive nature of the Hill memorandum, there is nothing particularly important or novel about this case. While the overwhelming sympathies here lie with Petitioners, this case, stripped of sympathy and emotion, is a "garden variety" statute of limitations case. There can be no reasonable conclusion other than that reached in the courts below – Petitioners' claims are time-barred as a matter of law. A contrary conclusion in this case would render the 180-day charge filing period under the Age Discrimination in Employment Act (as well as the other statutes of limitations in issue) virtually meaningless.

Petitioners place great emphasis on the argument that the Company failed to disclose, and even wanted to conceal, its alleged discriminatory motive. Such an argument misses the point. It is a rare case indeed in which the employer openly discloses to the employee that he or she is being terminated for a discriminatory reason. The law logically requires something more than concealment or nondisclosure of the discriminatory bias in order to toll the limitations period. That "something more" is lacking in this case.

Regardless of whether this case presents an important or novel issue to warrant the Court's review, to toll the charge filing period, Heideman must demonstrate that the Company engaged in affirmative conduct on which he actually and reasonably relied thereby preventing the filing of a timely charge and complaint. Not only can Heideman not meet this burden of demonstrating actual and reasonable reliance on his part, the facts are powerfully to the contrary.

Respondent did nothing to lead Heideman to believe that he had no legal recourse. In fact, Heideman's own actions belie such an allegation. Heideman admits that he never believed for a moment the reasons given by the Company for his discharge. To the contrary, Heideman believed at the time of his discharge that he was being lied to and that "there had to be another reason." (Heideman Depo. p. 185). Heideman so disbelieved the reasons given him for his discharge that he went to a private attorney in addition to going to the National Labor Relations Board for information and advice. Thus, as a matter of law and fact, Heideman was not fooled by the reason he was given for his discharge.

Moreover, there are no credibility determinations or factual disputes presented in this case. The parties jointly stipulated to the facts which the courts below relied on in ruling on the Motion for Summary Judgment. (Respondent's A4-13). Based upon those undisputed, stipulated facts, the district court properly concluded, and the Eighth Circuit affirmed, that Respondent was entitled to summary judgment under Federal Rule of Civil Procedure 56(c).

REASONS FOR DENYING THE WRIT

I.

THE ISSUES PRESENTED BY THIS CASE ARE NOT SUFFICIENTLY IMPORTANT OR NOVEL TO WARRANT REVIEW BY THIS COURT.

In the Writ, Petitioners attempt to argue that the law regarding tolling is unsettled. Nothing could be farther from the truth. The law on tolling of limitations periods is well settled – a limitations period may be tolled where the employer engages in affirmative conduct which actually prevents the filing of a timely claim. Just because Petitioners disagree with the way the tolling doctrine was applied in this case does not mean the law in the circuits regarding tolling is inconsistent or unsettled.

The doctrine of equitable tolling is well defined in virtually every circuit[1] as well as in the prior decisions of

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[1] *English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) (summary judgment for employer where plaintiff could not show that employer actions caused delay in filing action); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286 (8th Cir. 1988) (summary judgment granted on equitable tolling issue where plaintiff contended that he had been led to believe his employment would continue but where record showed plaintiff had applied for over 50 jobs in the interim); *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 358-359 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (summary judgment affirmed as to equitable tolling provision of severance benefits and job referrals do not toll statute); *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527, 1532 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983) (no equitable tolling where employer did not tell plaintiff it would reinstate him and did nothing to prevent plaintiff from consulting an attorney or bringing a suit); *Naton v. Bank of California*, 649 F.2d 691 (9th

(Continued on following page)

this Court, and this Court has declined to review similar cases on several prior occasions. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (in Title VII case, court holds that one who fails to act diligently in pursuing one's rights cannot invoke equitable principles to excuse that lack of diligence or toll running of the statute). In short, the issues raised by Petitioners have been litigated numerous times, the law is well-settled and there is no need for clarification or modification of the law of equitable tolling.

II.

THIS CASE WAS CORRECTLY DECIDED ON SUMMARY JUDGMENT AND ON APPEAL IN THE EIGHTH CIRCUIT.

In evaluating the appropriateness of the district court's grant of summary judgment and the Eighth

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Cir. 1981) (actual and reasonable reliance on defendant's conduct and misrepresentations must be shown before equitable estoppel applies); *Blumberg v. HCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (court rejected plaintiff's argument that she had been misled by the employer's statement that she was discharged "for cause" when she was actually fired because of her age); *Klausing v. Whirlpool Corp.*, 623 F. Supp. 156, 162 (S.D. Ohio 1985), appeal dismissed without opinion, 785 F.2d 309 (6th Cir. 1986) (no equitable tolling where plaintiff claimed that defendant employer had fraudulently refused to inform him of the true reasons for his demotion thereby allegedly tolling the limitations period and where plaintiff later received actual evidence that his demotion had been discriminatory on the basis of his age); *Eubanks v. Harvard Indus., Inc.*, 712 F. Supp. 146, 148 (E.D. Ark.), *aff'd*, 889 F.2d 1092 (8th Cir. 1989).

Circuit's affirmance, it is important to note that the decisions below were made on a *stipulated factual record*. The parties also stipulated that the district court could refer to the deposition transcripts and deposition exhibits "to the same extent as if the deponents were personally testifying under oath before this Court, and the deposition exhibits were offered into evidence." (Respondent's A12, ¶ B). Hence, the usual limitations of summary judgment, such as where there are credibility issues or disputed issues of fact, are non-existent here since the parties *agreed* upon virtually all of the facts material to the summary judgment motion, and further agreed that the depositions and deposition exhibits could be given the same weight and consideration by the court as if the testimony and exhibits were presented live at an actual trial on the tolling issue.

Rule 56 of the Federal Rules of Civil Procedure, as reaffirmed in this Court's "summary judgment trilogy," is critical to the functioning of our judicial system. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *cert. denied*, 484 U.S. 1066 (1988), the first of this Court's "summary judgment trilogy," the Court reaffirmed the importance of the summary judgment procedure "as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action' . . . . " *Id.* at 327 (quoting Fed. Civ. Proc. 1) (citations omitted).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court further stated that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

Finally, in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987), the Court emphasized:

> Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

Id. at 587 (quoting Fed. R. Civ. Proc. 56(e)).

A. Mr. Heideman's Age Discrimination Claim Is Time-Barred, And Therefore Summary Judgment was Appropriate.

In order to sue for age discrimination under the ADEA, a plaintiff must first file a charge of discrimination with the EEOC within 180 days of the alleged unlawful employment practice. 29 U.S.C. § 626(d)(1) (1982). The timely filing of a charge of age discrimination with the EEOC is a condition precedent to suit under the ADEA and functions as a statute of limitations. *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 359 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984). Further, suit must be commenced within two years of the alleged unlawful occurrences or within three years in the case of a willful violation. 29 U.S.C. § 626(e) (1982). Neither the 180-day charge filing period nor the two or three year statute of limitations for filing suit was met in the present case.

Where the challenged employment decision is discharge, the charge filing and suit filing limitation periods begin to run from the date on which the employee is notified of the discharge. *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (Title VII case; court holds that charge

filing period begins to run from the time that the employee had notice of the adverse employment action); *Mogley v. Chicago Title Ins. Co.*, 719 F.2d 289, 290 (8th Cir. 1983). Applying this standard, Heideman's age charge was filed over seven years too late. Heideman was notified of his discharge in June, 1979, but did not file a charge of age discrimination until September 5, 1986 and did not file suit until November, 1987. Accordingly, the courts below properly concluded that Heideman's age discrimination claim was time-barred.

B. The Courts Below Properly Held That There Was No Basis For Tolling The Charge Filing Period In This Case.

Under certain limited circumstances, the charge filing period under the ADEA may be subject to equitable tolling. Equitable tolling of the charge filing period is an extraordinary remedy that should not and cannot be used simply to preserve a plaintiff's case because of sympathy for the litigant. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (Title VII). Only where the defendant wrongfully deceives or misleads an employee in order to conceal the existence of a cause of action will the 180-day period be equitably tolled. *See e.g. English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988). "Although the filing period may be tolled for sufficient legal justification, the courts are reluctant to do so, and the plaintiff bears the burden of proving facts which would justify tolling." *Eubanks v. Harvard Indus., Inc.*, 712 F. Supp. 146, 148 (E.D. Ark.), *aff'd*, 889 F.2d 1092 (8th Cir. 1989).

Under the ADEA, equitable tolling applies only where the plaintiff is able to establish one of two things: either that the employer did not comply with the notice posting requirement of the Act, or that the employer engaged in some sort of affirmative conduct which prevented the filing of the charge of discrimination. Neither circumstance is present here.[2]

The Company did not engage in any affirmative conduct which would justify tolling the limitations period. The doctrine of equitable estoppel relied on heavily by Petitioner applies only where an employer makes affirmative misrepresentations *on which an employee actually and reasonably relies*, thereby preventing the filing of a timely charge. *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); *Blumberg v. HCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). To establish affirmative conduct by a party justifying the tolling of the limitations period, the plaintiff must show that the employer misled him as to the finality of his termination or in some other extraordinary way prevented him from asserting his rights. *Compare, Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) (issue exists as to whether filing period was tolled where employer misrepresented his intention to reinstate plaintiff, thereby inducing plaintiff to forego from filing ADEA claim) with *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983) (no equitable tolling where employer did not tell plaintiff it would reinstate him or actively prevent the filing of suit or consulting

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[2] It is undisputed that the required ADEA notices were properly posted at the time of Heideman's discharge.

with an attorney). The filing period is not tolled simply because the plaintiff alleges that he was not aware of sufficient facts as to realize that he was the victim of age discrimination. *Eubanks v. Harvard Indus., Inc.*, 712 F. Supp. 146, 148 (E.D. Ark. 1989), *aff'd*, 889 F.2d 1092 (8th Cir. 1989); *Caudill v. Farmland Indus., Inc.*, 698 F. Supp. 1476, 1481 (W.D. Mo. 1988). Thus, only where the employer engages in overt "conduct likely to mislead plaintiff into sleeping on his rights" will the employer be equitably estopped from asserting the statute of limitations defense.

Heideman's argument on the equitable estoppel theory is simple – he argues that because he was given an allegedly pretextual reason for his discharge, and was not given the real reason – age, he was misled into delay in filing a charge. If such an argument were accepted, the charge-filing period would become meaningless. Discrimination cases by their very nature almost always involve the claim that the plaintiff was provided with a pretextual reason for the employment action under scrutiny. *If the mere allegation that the plaintiff was provided with a pretextual reason for the employment action were enough to toll the statute of limitations, the statute would be tolled in virtually every employment discrimination case.*

The mere fact that an employee contends that he was not given the true reason for his termination (*i.e.* age) is not sufficient to toll the statute of limitations. In *Blumberg v. HCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), the plaintiff argued that she had been misled by the employer's statement that she was discharged "for cause" when in fact she was terminated because of her age. The court in *Blumberg* rejected

plaintiff's argument that because the employer "concealed" the true reason for her termination, it should be equitably estopped from asserting the limitations defense:

> Blumberg's suggestion that the Hospital somehow misled her by not expressly declaring that her discharge was due to her age is tantamount to asserting that an employer is equitably estopped whenever it does not disclose a violation of the statute. This would make the 180-day period virtually meaningless.

848 F.2d at 645.

Similarly, in *Klausing v. Whirlpool Corp.*, 623 F. Supp. 156, 162 (S.D. Ohio 1985), *appeal dismissed without opinion*, 785 F.2d 309 (6th Cir. 1986), the plaintiff was informed by another employee who had prevailed on an ADEA claim against the defendant of actual evidence that his demotion had been discriminatory on the basis of his age. The plaintiff claimed that the employer had fraudulently refused to inform him of the reasons for his demotion, thereby tolling the limitations period. The court rejected plaintiff's argument that the limitations period was tolled until he had obtained actual knowledge sufficient to prove his suspicion of discrimination. 623 F. Supp. at 162.

In order to invoke the doctrine of equitable estoppel, the plaintiff must have actually been misled. In *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981), the court stated:

> A finding of estoppel must rest on consideration of several factors. *Of critical importance is a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representations.* Also important is evidence of improper purpose on

> the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct.

(citation omitted) (emphasis added).

Critically, Heideman never believed for a moment that the reason given to him for his discharge was the true reason. Indeed, the parties have stipulated that "[a]t the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to." (Respondent's A9, ¶ 21).

Here, Heideman did not rely on anything Respondent said or did. The stipulation of the parties regarding the facts of this case says it all:

> At the time of his termination or shortly thereafter, *Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated,* and that he *was being lied to.*
>
> Mr. Heideman suspected, after being notified of his termination, that *he had been lied to* by Mr. Hill when he was demoted and offered the position in Memphis, in that Mr. Hill then actually wanted to cause Mr. Heideman to voluntarily resign, or terminate him shortly after transferring him to the Memphis office, not have him build the Memphis region. Mr. Heideman did not have any opinion or belief, however, as to the real reason he was terminated.
>
> Mr. Heideman visited a federal agency office in Memphis, Tennessee . . . in an effort to see if he could get some help *in forcing Defendant to tell him the reason for his termination.* . . .
>
> The same day Mr. Heideman visited the federal agency office, he visited with the attorney

> referred to him by the agency representative. . . . *The attorney offered to look into the matter* if Mr. Heideman was willing to pay him $70.00 per hour. Under the circumstances, Mr. Heideman decided it did not make sense to employ the attorney, so *he just dropped the matter.*

(Respondent's A9-A10, ¶ ¶ 21, 22, 23, 24) (emphasis added).

As stipulated by the parties, Heideman actually took action to protect his rights. He visited a federal agency in Memphis, Tennessee (apparently the National Labor Relations Board or perhaps the Department of Labor) "in an effort to see if he could get some help in forcing Defendant to tell him the reason for his termination." (Respondent's A9, ¶ 23). Heideman also contacted a private attorney "who offered to look into the matter." (Respondent's A9-A10, ¶ ¶ 23-24). Moreover, the inability of Heideman to obtain a reason for his termination that he deemed to be an adequate explanation should further have alerted Heideman to the possibility of a discriminatory motive. *See Mull v. Arco Durethene Plastics, Inc.*, 599 F. Supp. 158, 166 (N.D. Ill. 1984), *aff'd*, 784 F.2d 284 (7th Cir. 1986) ("if anything, Arco's failure to issue a formal written notice [of termination] should have alerted Mull to the possibility that he was being treated discriminatorily."). In short, Heideman was not lulled by Respondent into sleeping on his rights.

Petitioners rely extensively on the *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), in support of their assertion that equitable estoppel should apply in this case. In *Reeb*, the female plaintiff *relied* on

the employer's statement that her job was being eliminated only to learn later that she had in fact been replaced by a less qualified male. In contrast, here Heideman did not rely on anything – in fact, he believed from the outset that he had been lied to.

Petitioners also place special emphasis on two other decisions: *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984) and *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). Neither case is on point. In *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984), the plaintiff demonstrated actual reliance on alleged misrepresentations by the employer. *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981), a non-ADEA case, also involved actual reliance by the plaintiff on statements made by the employer, statements which left the plaintiff no reason to doubt the employer's explanation. Further, *Richards* was decided in the context of a motion to dismiss where the court had no facts, apart from the pleadings, in front of it. The *Richards* court expressly stated that tolling issues were particularly difficult to resolve on a motion to dismiss before any discovery had been taken. Here discovery had been completed and a broad stipulation of facts agreed upon by the parties.

Petitioners attempt to make much of the fact that Judge Magnuson in the District of Minnesota denied summary judgment in a case where the Hill memorandum was also at issue ("the Minnesota cases"). Petitioners overlook two critical facts. First, Judge Magnuson did not have the benefit of a stipulated factual record such as the one presented here. Second, in his Decision

set forth at A80 in Petitioners' Appendix, Judge Magnuson goes to great lengths to distinguish the *Heideman* case from the Minnesota cases. In the Minnesota cases, "each plaintiff *believed* that either his actions, or business conditions generally, compelled his own termination. . . . " (Petitioners' A84) (emphasis added). In other words, the plaintiffs in the Minnesota cases, unlike Heideman here, relied on and believed what the Company told them, and Judge Magnuson expressly noted that critical distinction between the Minnesota cases and the Heideman case presented here.

Heideman had more than an adequate basis *in 1979* upon which to file an administrative charge of discrimination with the EEOC, and nothing the Employer did discouraged him from doing so. Specifically, Heideman knew or believed the following: (1) he was fifty-three years old; (2) he was demoted and then discharged; (3) he was replaced in Kansas City by someone 10 to 15 years younger than himself; (4) his job performance had never been criticized; (5) the reason he was given for his discharge was a lie; and (6) he had constructive knowledge of his rights under the ADEA.[3] Because "the time begins when the facts that would support a cause of action are or should be apparent," *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 848 U.S. 1007 (1989), the charge-filing began to run when Heideman was demoted and then discharged in 1979. As explained by the court in *Blumberg*:

---

[3] Although Heideman "did not remember" seeing the ADEA poster, it was undisputed on appeal that such notices were properly posted, thus affording Heideman constructive knowledge of his ADEA rights.

> [I]t is not necessary for a claimant to know all of the evidence for her to file a claim or to begin the 180-day period. . . .

848 F.2d at 645.[4]

A similar common sense approach was taken by the Seventh Circuit Court of Appeals in *Vaught v. R.R. Donnelly & Sons*, 745 F.2d 407 (7th Cir. 1984). There the employee sought to excuse the untimely filing of his age discrimination charge by arguing that it was only after the 180-day charge-filing period had expired that he became aware of facts sufficient to support a discrimination charge. The court disagreed, concluding that the charge-filing period began to run at the time the employee was demoted. In reaching that conclusion, the court observed:

> Vaught knew more than enough facts to establish his prima facie case: he knew that he was fifty-nine years old; he knew that he had always received very good job performance evaluations and, so far as he knew, had no reason to expect his job was in danger; he knew that he was demoted; and he knew that he was being replaced by a man he believed to be twenty years his junior.

---

[4] In *Blumberg*, the Fifth Circuit concluded that the charge-filing period began to run at the time of the employee's discharge where she "knew that she was a member of the protected age class, she knew that she had been terminated from a job she considered herself qualified to perform, and she believed her replacement to be a woman in her thirties." 848 F.2d at 645. Similarly here, and for similar reasons, the charge-filing period began to run at the time of Heideman's discharge.

745 F.2d 411. Accordingly, summary judgment for the employer was affirmed on the issue of equitable estoppel. The same result is appropriate here.

Petitioners seem to argue that the offensive nature of the Hill memorandum itself establishes that tolling is appropriate. However, the Hill memorandum goes to the merits of the case - whether Heideman was the victim of age discrimination. The applicability of equitable estoppel is not determined by the merits of the underlying claim or the sympathy quotient present were the case to be tried. Heideman is attempting to circumvent the statute of limitations problem by arguing that because he was discriminated against (as shown by the Hill memorandum), he by necessity had to have been lied to, thus tolling the limitations period. However, the merits of the underlying claims cannot determine the appropriateness of tolling. Summary judgment was properly granted on Heideman's age discrimination claim.

III.

SUMMARY JUDGMENT WAS PROPERLY GRANTED AGAINST HEIDEMAN ON HIS ERISA CLAIM.

ERISA does not contain a statute of limitations for civil actions and therefore, the Court must look to the most analogous and appropriate state statute of limitations. *Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). Under Tennessee law, an action under § 1132 of ERISA is governed by the six year statute of limitations applicable to contracts contained in Tennessee Code Annotated § 28-3-109 (1980). *Haynes v. O'Connell*, 599 F. Supp. 59, 62 (E.D. Tenn. 1984).

As correctly noted by the Court of Appeals, in 1979 the Heidemans were aware of sufficient facts to put a reasonable person on notice of a possible claim: they knew of their own health problems, they understood that the Company was aware of such health problems, they believed that Leo Heideman had been fired without a legitimate reason. (Petitioners' A22). Thus, Heideman's ERISA claim, like his age discrimination claim, was untimely and there is no legal basis for tolling the statute of limitations as to such claim.

IV.

SUMMARY JUDGMENT WAS PROPERLY GRANTED ON PETITIONERS' STATE LAW CLAIMS

Petitioners' criticism of the lower courts' resolution of the choice of law question is also devoid of merit. A senior district judge sitting in Kansas City, Missouri surely knows how to apply Missouri choice of law rules, as does a three judge panel of the Eighth Circuit sitting in St. Louis, Missouri. In any event, as explained by the Court of Appeals, Petitioners' state law claims are time-barred under *both* Tennessee *and* Missouri law. (Petitioners' A24, Ftnt.4).

V.

THE APPELLATE STANDARD OF REVIEW IN THIS CASE IS THE "CLEARLY ERRONEOUS" STANDARD.

The proceedings in the district court regarding the stipulation on the factual issues relevant to the limitations issue constituted a Rule 42(b) evidentiary hearing on the merits tried to the court by consent of the parties.

Thus, Petitioners waived their right to a jury trial by their conduct, stipulations, and failure to object to the proceedings. Accordingly, even though the District Court's and Appeals Court's finding merit affirmance even under the strict standard of *de novo* review, the appropriate standard of appellate review in this case is the Rule 52(a) "clearly erroneous" standard.

At the August 31, 1988 pretrial conference, the statute of limitations issue on summary judgment was separated pursuant to Federal Rule of Civil Procedure 42(b). A pretrial order to that effect was entered. (Respondent's A1-3). In that pretrial order, the parties were requested to "confer and to attempt to agree upon a full stipulation of facts upon which the separated issues may be determined by this Court." (Respondent's A1, ¶ 2(a)). In its Order, the District Court stated that it anticipated that counsel for the parties "may be able to agree that the depositions [transcripts] and the deposition exhibits be attached to the statute of limitations stipulation for consideration by the Court and *in order that the Court may resolve any material facts that may otherwise be in dispute on the basis of that record.*" (Respondent's A1, ¶ 2(a)) (emphasis added).

The parties did just that. The parties agreed upon and submitted a number of factual stipulations regarding the statute of limitations issues. (Respondent's A4-13). In addition to the factual stipulations, the parties agreed and stipulated that, in ruling on the limitations issues pursuant to Rule 42(b), the district court "may refer to the transcripts of all depositions taken in the instant litigation, and to the deposition exhibits, *to the same extent as if the deponents were personally testifying under oath before this*

Court, and the deposition exhibits were offered into evidence." (Respondent's A18, Section B) (emphasis added). Petitioner is bound by those stipulations. *See Skeets v. Johnson*, 816 F.2d 1213, 1215 (8th Cir. 1987) (en banc) (holding that a party's stipulation of facts is controlling and conclusive and the court is bound to enforce the facts as stipulated).

The procedures utilized by the district court in this case were virtually identical to those used in *Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 717 and n.6 (8th Cir. 1982). In *Hrzenak*, the defendant moved for partial summary judgment on the basis of the plaintiff's failure to file a timely charge of age discrimination. In response, plaintiff raised the issue of equitable tolling and, like Heideman here, stipulated to certain facts and consented to a pretrial evidentiary hearing on the issue before the district court, despite the fact that the plaintiff was entitled to and apparently demanded a jury trial. The Eighth Circuit noted that the district court there correctly determined that the defense of failure to file a timely charge is not jurisdictional and that "the proper procedure was to hold a hearing to determine whether the circumstances would support a finding of equitable tolling." *Id.* at 717 n.6. The court further noted that "pursuant to this determination the district court included a provision in the pretrial order which provided a pretrial hearing on [defendant's] motion for summary judgment. Thereafter counsel for both parties executed the pretrial order including a stipulation of uncontroverted facts."

The district court in *Hrzenak* granted defendant's motion for summary judgment on the limitations issue, and the plaintiff appealed. The Eighth Circuit stated:

> We do not view the proceeding below as one for summary judgment. See *Nielsen v. Western Elec. Co.*, 603 F.2d 741 (8th Cir. 1979). *Here, as in Nielsen, the record reflects that both parties treated the proceeding as a trial on the factual issues underlying [plaintiff's] claim for equitable tolling.* . . .
>
> Since all the evidence on the issue of equitable tolling was presented and argued, we consider the district court proceeding to have been a hearing in the nature of a trial on that issue. There is no reason why the parties cannot agree to try certain issues on the merits and if the parties have done so, we properly may treat such proceeding as a trial on those issues even though cast in the form of a motion for summary judgment. [Citations omitted]
>
> *Because we treat the district court proceeding as a trial on the factual issues underlying [plaintiff's] claim for equitable tolling, we are bound by the district court's findings unless they are clearly erroneous.* [Citing Rule 52(a) and *Nielsen*, 603 F.2d at 742].

Hrzenak, 682 F.2d at 718 (emphasis added).[5]

---

[5] *Stewart v. RCA Corp.*, 790 F.2d 624, 629-631 (7th Cir. 1986) (stating that the statute of limitations defense "is a prime candidate for a limited trial under Rule 42(b)"; holding that when a party implicitly consents to the resolution of a disputed issue in a partial bench trial under Rule 42(b), demand for jury trial was deemed waived and "clearly erroneous" standard governs appellate review of district court's conclusions); *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947, 950-951 (4th Cir. 1985) (holding that a party waives the right to jury trial by failing either to object to district court's determination of dispositive issues of fact or to in any way remind district court of earlier demand for jury trial); *Royal Am. Managers, Inc.*

(Continued on following page)

At no time up to the present have Petitioners argued that they did not have an adequate opportunity to present all of their evidence on the limitations issue to the district court. Indeed, most if not all of the relevant evidence on this issue comes directly word-for-word from the parties' stipulations and Petitioner Heideman's own deposition testimony which the parties specifically agreed could be considered and evaluated by the district judge as if the deponent were testifying live in court so as to permit the court to "resolve any material facts that may otherwise be in dispute. . . . " (Respondent's A1, ¶ 2(a)).

The record containing the parties' stipulation is unequivocally clear that the parties and the district court consented to and treated the proceeding below as a separate trial on the merits to the court pursuant to Rule 42(b). Therefore, the appellate review in this case is governed by the Rule 52(a) "clearly erroneous" standard. *See Anderson v. City of Bessemer City,* 470 U.S. 564 (1985). For that reason as well, the Petition should be denied.

(Continued from previous page)

v. IRC Holding Corp., 885 F.2d 1011, 1018-1019 (2d Cir. 1989); *Allen v. Barnes Hosp.*, 721 F.2d 643 (8th Cir. 1983) (plaintiff's failure to object to submission of employment discrimination action to court deemed waiver of right to jury trial despite earlier demand therefore).

VI.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for A Writ of Certiorari be denied.

Atlanta, Georgia on November 28, 1990.

Respectfully submitted,

JOHN F. WYMER, III
JONES, DAY, REAVIS & POGUE
3300 First Atlanta Tower
Atlanta, GA 30383-3101
(404) 521-3939

Counsel of Record for Respondent

DEBORAH A. SUDBURY
JONES, DAY, REAVIS & POGUE
3300 First Atlanta Tower
Atlanta, GA 30383-3101
(404) 521-3939

R. HARRIS TURNER
2233 Lee Road, Suite 101
Winter Park, FL 32789

Attorneys for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEO HEIDEMAN and SHIRLEY HEIDEMAN,	:	
Plaintiffs,	:	No. 88-0010-CV-W-JWO
vs.	:	
PFL, INC., et al.,	:	(Filed August 31, 1988)
Defendants.	:	

ORDER

At the pretrial conference held this day, counsel agreed and the Court approved the following:

1. That this case not be set for trial on the joint trial docket to commence September 26, 1988.

2. That the statute of limitations issues presented in defendants' pending August 24, 1988 motion for summary judgment should be and are hereby separated for determination pursuant to Rule 42(b) of the Federal Rules of Civil Procedure and that those issues shall be determined in accordance with the following procedures:

(a) The parties will be granted until September 26, 1988 to confer and to attempt to agree upon a full stipulation of facts upon which the separated issues may be determined by this Court. It is anticipated that counsel may be able to agree that the depositions and the deposition exhibits be attached to the statute of limitations stipulation for consideration by the Court and in order

that the Court may resolve any materials facts that may otherwise by in dispute on the basis of that record.

(b) In the event the parties are unable to agree on a full stipulation of facts as provided in paragraph 2(a), they shall nevertheless agree upon a partial stipulation of facts in which all factual data, including the attachment of depositions and deposition exhibits shall be reduced to writing and filed with the Court on or before September 26, 1988.

(c) In the event the parties are able to file only a partial stipulation, they shall also simultaneously file a separate joint written report on September 26, 1988 in which each party shall set forth with particularity the factual data that each party believes should be before the Court in its determination of the pending motion for summary judgment about which they have not been able to agree. The joint written report of counsel shall also state whether either party believes that the factual data identified by opposing counsel is not a "material fact" within the meaning of Rule 56 of the Federal Rules of Civil Procedure. Appropriate briefs shall be separately filed by each party to support the respective contentions of the parties in regard to the materiality of the factual data identified.

3. In the event the parties are able to agree upon and file a full stipulation of facts on September 26, 1988 as provided in paragraph 2(a) above, plaintiffs shall prepare, serve, and file their suggestions in opposition to defendants' pending motion for summary judgment on or

before October 14, 1988. Defendants shall file their reply suggestions in support on or before October 21, 1988.

4. In the event the parties are able to agree only on a partial stipulation as provided in paragraph 2(b) above, the Court will enter orders directing further proceedings in light of the facts agreed upon in the partial stipulation, the joint written report file by counsel, and the briefs filed by the parties.

5. If the parties agree that the dates above set forth need to be extended a reasonable period of time, they shall confer and present an agreed order extending the deadlines above set for the Court's approval. All agreed orders for extensions of time shall be presented before the expiration of the time periods established by this order.

IT IS SO ORDERED.

/s/ John W Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri

August 31, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEO HEIDEMAN, et ux.,	)	
Plaintiffs,	)	Case No. 88-0010-CV-W-JWO
v.	)	
PFL, INC.	)	
Defendant.	)	

STIPULATIONS REGARDING STATUTE OF LIMITATIONS ISSUES

A. FACTUAL STIPULATIONS

The parties hereto, through their respective counsel, hereby stipulate to the following facts:

1.

Plaintiff Leo Heideman ("Mr. Heideman") was hired by Defendant on or about July 12, 1964, as Regional Manager, North Central Region.

2.

Defendant is a Minnesota corporation whose corporate name at all times pertinent to the instant litigation was Northland Foods, Inc., Jeno's, Inc. or PFL, Inc.

3.

Mr. Heideman's initial salary as an employee of Defendant was $10,400 per year.

4.

Mr. Heideman was born on February 1, 1926, in Seneca, Kansas. He moved to Kansas City, Missouri, in 1942, and has lived in Kansas City or Lee's Summit, Missouri, continuously since 1942, with the exception of several months in 1979, when he lived in Germantown, Tennessee.

5.

In 1967, Mr. Heideman was promoted to the position of National Field Sales Supervisor, and from 1970 to 1978 worked in several different management positions with Defendant, as a vice president, the last of which was Vice President, Sales, for the Central Division of Defendant.

6.

Starting in approximately 1970, and continuing at least through 1979, Defendant divided its sales activity within the Continental United States into approximately two or three divisions, each of the divisions consisting of a multi-state area. Each division, in turn, was divided into several different geographically smaller Regions.

7.

During the course of his employment with Jeno's, Inc., Mr. Heideman worked primarily out of his home in Kansas City, Missouri, and traveled on a varying basis (approximately on a monthly basis) to the corporate headquarters of Jeno's, Inc. in Duluth, Minnesota. He

would ordinarily stay in Duluth, when making these visits, a day and a night.

8.

At various times during Mr. Heideman's employment with Defendant, executive officers of Defendant expressed a preference that Mr. Heideman move to Duluth, Minnesota, where Defendant maintained its corporate headquarters. At no time, however, did Defendant issue an ultimatum to Mr. Heideman to move to Duluth, or lose his position of employment with Defendant.

9.

On or about December 6, 1978, Carl Hill ("Mr. Hill") was employed by Defendant as Senior Vice President, Marketing and Sales. He had previously been employed by Defendant from about 1967 or 1968 until 1972. At the time he left Defendant's employment in 1972, he was Executive Vice President of Marketing and Sales.

10.

On or about January 3, 1979, Mr. Hill's actual authority was made co-extensive with that of the then president of Defendant, Dick Jones ("Mr. Jones"), and Mr. Hill reported directly to the chairman and vice chairman of Defendant, not to Mr. Jones.

11.

On or about December 21, 1978, Mr. Hill wrote a confidential memorandum ("the Hill memo") to Mr. Jones

regarding what Mr. Hill referred to as "additional responsibilities for Parr and Carpenter." Parr and Carpenter, as referred to in the Hill memo, were John Parr ("Mr. Parr"), then the Vice President of Sales of Defendant, and Morris J. Carpenter ("Mr. Carpenter"), then the Vice President of Marketing of Defendant, both of whom reported to Mr. Hill. Mr. Parr was then Mr. Heideman's immediate supervisor.

12.

Courtesy copies of the Hill memo were directed to be delivered to Mess'rs. Parr, Carpenter and Mick Paulucci ("Mr. Paulucci"). Mr. Paulucci was then the Vice Chairman of the Board of Directors of Defendant. The document appended to this Stipulation as "Exhibit A" appears to be a true copy of the courtesy copy of that memo delivered to Mr. Carpenter; however, Defendant does not know who made the handwritten comments thereon, nor when they were made.

13.

Mr. Hill admits that it is possible, but thinks it unlikely, that he wrote the following words in the upper right-hand corner of the first page of the Hill memo "Jay – – Read and Destroy."

14.

Around Christmas, 1978, when Mr. Heideman was visiting Defendant's office in Duluth, Minnesota, Mr. Hill called Mr. Heideman into Mr. Hill's office and advised

Mr. Heideman that Mr. Heideman was being demoted from Vice President, Sales – Central Division, to Manager of the Memphis Region, that he was expected to build up the Memphis Region, that he would have to move immediately and take over this new responsibility, and that Mr. Heideman would not receive any reduction in pay with respect to the demotion.

15.

After considering the proposed relocation to Memphis, Tennessee, and demotion, and discussing the same with Mrs. Heideman, Mr. Heideman decided to accept the offered relocation and responsibility. Had he not accepted the offer, he would not have been able to continue his employment with Defendant.

16.

Mr. Heideman was replaced as a vice president of Defendant by Ed Korkki ("Mr. Korkki"). Mr. Korkki was born July 18, 1940.

17.

In early January, 1979, Mr. Heideman advised Defendant that he would accept the position offered in Memphis, and immediately undertook serving the Memphis Region by traveling to that Region (which included Memphis, Nashville and Johnson City, Tennessee; Jackson, Mississippi; Little Rock, and possibly, Fort Smith, Arkansas) from his home in Kansas City until he could

obtain permanent housing in Memphis on or about April 16, 1979.

18.

On or about June 1, 1979, Mr. Heideman was advised by Mr. Parr by telephone that Mr. Heideman was being terminated, immediately.

19.

Mr. Heideman lived, worked and was in Tennessee at the time that he was terminated, and had been assigned to the Memphis territory for approximately five months. Mrs. Heideman also resided in Tennessee with her husband.

20.

Mr. Heideman, during his entire employment by Defendant, never heard of any problems within Defendant's organization concerning age discrimination. It never occurred to him, until he subsequently received a copy of the Hill memo in 1986, that he might have been the victim of age discrimination practices by Defendant.

21.

At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to.

22.

Mr. Heideman suspected, after being notified of his termination, that he had been lied to by Mr. Hill when he was demoted and offered the position in Memphis, in that Mr. Hill then actually wanted to cause Mr. Heideman to voluntarily resign, or terminate him shortly after transferring him to the Memphis office, not have him build the Memphis Region. Mr. Heideman did not have any opinion or belief, however, as to the real reason he was terminated.

23.

Mr. Heideman visited a federal agency office in Memphis, Tennessee, which he believes to have been the National Labor Relations Board, in an effort to see if he could get some help in forcing Defendant to tell him the reason for his termination. The agency representative with whom he met stated that they were unable to help him, and referred him to a private attorney in Memphis. Mr. Heideman does not recall any mention made regarding age discrimination laws during his visit at the agency office.

24.

The same day Mr. Heideman visited the federal agency office, he visited with the attorney referred to him by the agency representative. The attorney advised Mr. Heideman that the employer did not have to give him a reason for termination, but could terminate him without a reason. The attorney offered to look into the matter if Mr.

Heideman was willing to pay him $70 per hour. Under the circumstances, Mr. Heideman decided it did not make sense to employ the attorney, so he just dropped the matter. Mr. Heideman does not recall any mention made regarding age discrimination laws during his visit with the attorney.

25.

Almost immediately after being advised by Mr. Parr that Mr. Heideman was terminated, Mr. and Mrs. Heideman decided to return to Kansas City. They sold their house in the Memphis area on or about August 14, 1979, and immediately moved back to Kansas City.

26.

On or about August 29 or August 30, 1986, Mr. Heideman received from Mr. Lawrence Williams ("Mr. Williams") an unsolicited copy of the Hill memo. This was the first time Mr. Heideman suspected that he may have been the victim of age discrimination practices by Defendant.

27.

Within two or three days after his receipt of the Hill memo, Mr. Heideman visited the Equal Employment Opportunity Commission ("EEOC") office in Kansas City, Missouri. Mr. Heideman filed a charge of discrimination with the EEOC on or about September 5, 1986.

28.

Mr. Heideman visited with one of his attorneys in the instant litigation, Mark J. Klein ("Mr. Klein"), on September 6, 1986, to determine if he had a right of private action against Defendant arising out of Defendant's actions.

29.

On August 23, 1986, before he had knowledge of the Hill memo, Mr. Heideman wrote to Jeno Paulucci stating his belief that he "was moved for a reason then fired on purpose."

30.

Plaintiffs filed suit in the Circuit Court of Jackson County, Missouri, on November 25, 1987, and this action was subsequently removed to this Court on January 4, 1988.

B. STIPULATION AS TO USE OF DEPOSITION TRANSCRIPTS AND EXHIBITS

The parties hereto, through their respective counsel, stipulate and agree that the Court may refer to the transcripts of all depositions taken in the instant litigation, and to the deposition exhibits, to the same extent as if the deponents were personally testifying under oath before this Court, and the deposition exhibits were offered into evidence.

Respectfully submitted,

POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.

/s/ Dennis E. Egan
Dennis E. Egan - No. 27449
1300 Commerce Trust Building
922 Walnut Street
Kansas City, Missouri 64106
(816) 221-2288

/s/ Mark J. Klein
MARK J. KLEIN - NO. 16403
1300 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 474-6137

ATTORNEYS FOR PLAINTIFFS

PAUL, HASTINGS, JANOFSKY
& WALKER

/s/ John F. Wymer, III
John F. Wymer, III
Forty-Second Floor
Georgia-Pacific Center
133 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 588-9900

BLACKWELL, SANDERS, MATHENY,
WEARY & LOMBARDI

/s/ John R Phillips
John R. Phillips – No. 22135
Two Pershing Square
Suite 1100
2300 Main Street
Post Office Box 419777
Kansas City, Missouri 64141-6777
(816) 274-6800

ATTORNEYS FOR DEFENDANT

(4)

No. 90-696

In The

Supreme Court of the United States

October Term, 1990

LEO HEIDEMAN and SHIRLEY HEIDEMAN,

Petitioners,

vs.

PFL, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust Bldg.
922 Walnut Street
Kansas City, MO 64106
(816) 221-2288

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

"Yes," there are "special and important reasons" for granting a Writ, as petitioners' "Questions Presented" concisely show. Note that respondent states the facts in *its favor,* so that the inattentive reader might be hypnotized into believing this simply is a dispute over facts – which everyone knows this Court will not review. This ploy might work *if there had been a trial.* The attentive reader of course will realize that the very difference between petitioners' version and respondent's version of the case *compellingly proves the need to review this case,* because factual issues were resolved *against* petitioners in violation of *all* summary judgment standards and the Seventh Amendment.

1. The Proceedings Below

Respondent begins with its demonstrably false argument that somewhere along the way this proceeding changed from a summary judgment determination into some type of "mini-trial." *No such thing occurred.*[1] The fact respondent finds it necessary to make up such an argument is wonderfully revealing, however, because it shows *respondent recognizes the trial court went too far,* and, indeed, weighed and decided factual issues – which should not have been done on a motion for summary judgment.

Second, respondent's repeated theme that the parties "stipulated" to *certain* facts also is a subtle and misleading attempt to lull the reader into thinking that the stipulation constituted all of the facts before the court. *It did not.* The stipulation was only a partial rendering of the facts, because all of the depositions were before the district court (see district court's Memorandum and Order); both parties filed affidavits; and a key part of the record which is *nowhere mentioned* in respondent's brief is the "Report on Statute of Limitations Issues," which, by the district court's order contained those additional parts of the record which the plaintiff considered "material" for summary judgment, but on which

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[1] This argument was first thought up and raised by the respondent *after submission of the case* to the Eighth Circuit – and the Eighth Circuit in its opinion specifically rejected this argument. (A7-10).

defendant/respondent *refused to stipulate*.[2] Plaintiff's report contains nineteen (19) additional paragraphs full of factual materials which presumably were "considered" by the district court, but not in plaintiff's favor.

Even if all facts had been stipulated, if different inferences might reasonably be drawn from the facts, the case *must* go to the jury "which weighs the contradictory evidence and inferences and draws the ultimate conclusion as to the facts." See *Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. 690, 700-701 (1962); *Tennant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29 (1944).[3]

2. The Facts

In this section, the key for this Court is to note how petitioners' statement of relevant facts *differs from* respondent's. This difference should have been tilted in plaintiff's favor, but was not. The district court and the Eighth Circuit followed respondent's lead by wrongly "searching the record for conflicting circumstantial [and direct] evidence" which was used against plaintiff "to take the case away from the jury . . . . " *Tennant v. Peoria*, supra, 321 U.S., at 35. Both courts sanctioned a violation of Rule 56, and improperly turned this case into a "paper trial," which is *specifically disavowed in this Court's* Rule 56 trilogy.

Respondent's third paragraph begins with Heideman's feeling he had not been told the real reason for his separation, and that he was "being lied to at the time of termination." Petitioner's Statement of Facts shows that is all Heideman felt or believed *back in*

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[2] The district court's Memorandum and Order specifically alludes to the reports and the depositions as matters considered in ruling the summary judgment. (A33-34). But there were key facts favorable to plaintiff contained in the report – all of which should have been construed in plaintiff's favor – which nowhere appear in the district court or Eighth Circuit opinions.

[3] Several factual issues improperly resolved against the plaintiff were not subject to any stipulation: 1) did defendant take action designed to conceal its misdeeds; 2) did the plaintiff "reasonably rely" on the defendant and act as a "reasonable man" in his actions and inactions?

1979. Defendant omits that Heideman's feelings that he had been "moved and deceived" first came to him in August 1986, well within the statute of limitations. (Heideman Depo. 120-123).[4]

In the very next paragraph, on page 7, respondent misstates more material facts, by stating that Heideman contacted an attorney but decided not to pursue the matter further, "*primarily because* of the cost involved in retaining an attorney." The stipulation cited by the defendant does not contain the word "primarily." Moreover, respondent's one-sided characterization omits the material facts testified to by plaintiff (See Petition at 9 – 11) that Heideman was told he "didn't have anything to stand on," he "had no legal recourse," and, most importantly – *until receipt of the* "Hill Memorandum," Heideman never felt he had any way of disproving the misleadingly vague reasons Parr had given for the termination. (Heideman Depo. 175-178).[5]

I. THE ISSUES PRESENTED BY THIS CASE ARE SUFFICIENTLY IMPORTANT OR NOVEL TO WARRANT REVIEW BY THIS COURT.

Respondent's argument summary uses a bit of reverse psychology by painting this as a "garden variety" limitations case that has nothing going for it but "sympathies." Nonsense. What it has are facts, law and equities favoring petitioners, and yet the courthouse doors have been closed before they got a chance. Respondent also has the audacity to urge this Court to avoid taking this case, because "harsh facts have the potential to make bad law." This Court is the *only* Court whose very purpose is to take on the hard facts and apply the law. If not this case, which one? If not now, when?

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[4] The statement "moved and deceived" comes directly from a letter from Heideman to PFL owner, Jeno Palucci, dated *August 23, 1986*. The deposition testimony is too lengthy to set out here, but the point is this isolated fact has been misleadingly used *against* Heideman instead of allowing the full context and import to be developed *at trial*, as our procedures require.

[5] Many *additional favorable facts omitted* by respondent (and courts below) appear in "Plaintiff's Report on Statute of Limitations Issues."

Petitioner's argument is *not* that the law regarding tolling is "unsettled." There is a *clear conflict* among circuits, which could not be better exemplified by comparing the cases cited in respondent's footnote 1 with those cited and discussed by petitioner at pages 19 through 24 of his brief. What is "unsettling" is the arbitrary manner in which summary judgment was applied in this case to deny the plaintiff his Seventh Amendment right to a jury resolution of factual issues, whereas in other circuits (and even in the District of Minnesota, which is in the Eighth Circuit) Mr. Heideman, no doubt, would be entitled to his day in court. Such whim and caprice raises the type of "special and important issues" which this Court is designed to prevent.[6]

II. THIS CASE WAS NOT CORRECTLY DECIDED ON SUMMARY JUDGMENT AND ON APPEAL.

After repeating the innocuous fact there was a *partial* stipulation, PFL next eases into the following false statement:

> Hence, the usual limitations of summary judgment, such as where there are credibility issues or disputed issues of fact, are non-existent here since the parties agreed upon virtually all of the facts material to the summary judgment motion, and further agreed that the depositions and deposition exhibits could be given the same weight and consideration by the court as if the testimony exhibits were presented live at an actual trial on the tolling issue.

Any "agreement" to use depositions and exhibits does nothing more or less than verbalize and apply Rule 56. It does *not* mean the parties somehow agreed to *pretend* testimony actually was presented live when it was *not*. Most important, the Eighth Circuit flatly rejected respondent's attempt to magically change this case from a "garden variety" summary judgment under Rule 56 to an

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[6] See *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443, at 450 (1957) (This Court is "vigilant" to review "any case where it appears" litigants have been deprived of a jury trial); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (reversing summary judgment); *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108 (1963) (This Court, per Justice White, granted cert. "to consider the question whether the decision below improperly invaded the jury's function.").

imagined trial reviewed under Rule 52(a). (See A10). Respondent's citing of this Court's "summary judgment trilogy" is interesting, because this Court's trilogy expressly disavowed any intent to allow courts to resolve cases by "paper trial" or "trial by affidavits."[7] In *Anderson*, this Court emphasized that the trial judge's function is to not weigh the evidence and determine the truth of the matter, but to determine "only whether there should be a trial." 106 S.Ct., at 2511. *Anderson* could not be clearer in warning the lower courts that the summary judgment holdings by no means authorize "trial on affidavits." 106 S.Ct., at 2513-14.

Respondent's argument at pages 13 through 23 provides a convenient compendium of *law conflicting with that cited in petitioners' brief*. Only this Court can decide what view is right.

Respondent cites *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), urging that only sympathy would allow the Heidemans their day in court. Petitioners can only hope this Court will see this condescending argument for what it really is – an insidious attempt to turn the outrageousness of petitioners' plight *against* them by mental jujitsu. The intended result is the reader believes the magnetic force of petitioners' plight is not based on compelling logic, plus well-entrenched legal grounds, but on "untrustworthy" emotions. Petitioners' right to have a jury trial rests on sound legal principles of federal law; petitioners respectfully suggest that what one feels when reading about petitioner's tortuous journey to nowhere is a sense of disbelief and perhaps outrage that the judicial process could lead to such a result.

At 16-17, PFL presses its "opening the floodgates" distortion of petitioners' tolling argument. This powerful intoxicant (wrongly embraced by the Eighth Circuit) fails for the reasons set out at 52-55 of this Petition. This is a clear case of affirmative misconduct *plus active concealment* by the employer, which was a fact easily and clearly recognized by the Minnesota District Court, which preserved the causes of action for the five employees who filed later than Heideman and *nine years after their termination*.

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[7] This case glaringly illustrates just how the lower courts are being persuaded daily to go farther than this Court intended.

This is the "rare case" where there is proof positive, not only of (1) a plan to discriminate in violation of the ADEA, but also (2) proof of a plan to mislead the employees and thereby *conceal the discriminatory plan itself.* The law of tolling is specifically designed to step in to relieve the petitioner from the consequences of not discovering earlier the defendant's blatantly illegal, expressly concealed scheme of discrimination. *At the very least,* the remedial, humanitarian purpose of the ADEA would compel that the courthouse doors remain open for those plaintiffs to *try to prove* their claims and recover for defendant's plainly exposed wrongs. The Eighth Circuit opinion here does not accept this view; the opinions in other circuits expressly endorse it. Only this Court can resolve such apparent conflict and caprice.

At page 18, PFL makes a statement disproved by the record (See Petitioners' brief), but improperly used *against* petitioners in the courts below: "Here, Heideman did not rely on anything respondent said or did." Such a material misstatement of a disputed fact, if resolved against the plaintiff, would be sufficient *standing alone* to compel that certiorari be granted to reverse the improper rendition of summary judgment.[8]

Here are just some of the *contrary* facts which raise a disputed triable factual issue, totally contrary to respondent's assertion that Heideman "did not rely on anything respondent said or did":

> Heideman believed Hill's statements at the time of his transfer to the Memphis region, that Hill simply wanted to have his own men serving as vice presidents of defendant. (Heideman Depo. 56-58, 122) (Plaintiff's Report, ¶ 3); Heideman "accepted as sincere" Hill's statement that Hill wanted individuals selected directly by him to serve as divisional vice presidents and report directly to him. Heideman accepted as plausible the reasons stated for the demotion and move from Kansas City to Memphis. (Heideman Depo. 43-44, 67-70, 122)

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[8] See *Dick v. New York Life Insurance Company,* 359 U.S. 437, at 444 (1959), wherein this Court reversed the appeals court because it "resolved *at least one* disputed fact in respondent's favor." (Emphasis added).

> (Plaintiff's Report, ¶ 4). Even though Heideman felt the reason Parr gave him for termination was not the real reason, *until he received the Hill Memorandum, Heideman never felt he had any way of disproving what Parr had told him about the reason for termination.* (Heideman Depo. 175-178) (Plaintiff's Report, ¶ 18).

At the top of page 19, respondent quotes the stipulation regarding the visit to the attorney's office, without noting those portions of Heideman's testimony which should have been construed in his favor, that the attorney told him he "had no recourse," causing Heideman to decide under those circumstances that it did not make sense to pursue what looked like a futile matter. Whether Mr. Heideman was "reasonable" in concluding like he did *is a matter for the jury* and does involve his credibility.[9]

Respondent tries to distinguish *Meyer v. Riegel Products Corporation* and *Richards v. Mileski* on the basis that the plaintiffs therein "demonstrated actual reliance on alleged misrepresentations by the employer." Did they? The point of this Petition is *Meyer* stands for the proposition that whether the plaintiff actually relied on the alleged misrepresentations by the employer *is a question of fact* which must be resolved at trial, and is totally inappropriate for summary judgment.

Most glaringly, respondent cannot dodge the totally opposite decision rendered by another district judge in the Eighth Circuit in the five Minnesota cases. Respondent tries to point to the "stipulated factual record"; but petitioner has shown how the stipulation itself does not contain all of the facts and, most importantly, some of those stipulated facts were construed against him below. Respondent also states that Judge Magnuson "goes to great lengths to distinguish" Heideman. What respondent omits is that this same defendant argued in the Minnesota action "that Heideman is indistinguishable from the instant case." (See Magnuson Decision, A92). The undeniable point of Judge Magnuson's decision is that it constitutes irrefutable proof that the evidence does not point all one way in defendant's favor, since two "reasonable minds" (District

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[9] In short, the actual record totally disproves respondent's argument that "the stipulation of the parties regarding the facts of this case *says it all.*"

Judge Oliver and District Judge Magnuson) reached *opposite conclusions* on facts and law that this same defendant called "indistinguishable." It is notable that Judge Magnuson, in "distinguishing" the *Heideman* case, had before him only the district court opinion in *Heideman*, which itself stated facts, drew inferences and made conclusions *against the plaintiff*. The reason Judge Magnuson's decision is so momentous is that he properly overruled summary judgment for the same reasons which *should have been controlling in this case:*

> At the summary judgment stage, the court is compelled to view the record in the light most favorable to the non-moving party. Having done so, the court is unable to say that no issues of material fact remain to prevent defendants from being entitled to judgment.

(See Judge Magnuson's Decision, at A98).

At page 23, respondent mischaracterizes petitioners' argument to be that "the offensive nature of the Hill Memorandum itself establishes that tolling is appropriate." Respondent also falsely argues that the Hill Memorandum only "goes to the merits of the case" rather than equitable estoppel.[10]

Respondent ignores that the very affidavits and arguments used by the defendant to establish "notice posting" also establish the company's *knowledge of the ADEA* prohibitions, and thus support the legitimate inference *before the jury* that the company well-knew the age discrimination policy espoused by the Memo subjected the company to liability under the Act, so the company also *wrote out* the plan to conceal it. The *jury* must decide if the Memo's explicit directives that the memo should be "Read and Destroyed," that the memo must be kept "Confidential," and that "problem-age employees" will thus be kept "none the wiser" as to the illegal plan, was "designed" to "deceive or mislead the plaintiff in order to conceal the existence of a cause of action," or lull him and others not to pursue their ADEA rights. Judge Magnuson found such explicit directives clearly supportive of equitable tolling/estoppel. Thus, it is the concealment in the Hill Memo, not the

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[10] Of course, this ignores this Court's decision in *Glus*, to the effect that "no man may profit from his own wrong," ignores that equitable estoppel requires only a showing of "some misconduct by the employer."

"offensive nature" of the discriminatory plan, that raises the triable factual issue on equitable tolling/estoppel.

III. & IV. THE ERISA AND STATE LAW CLAIMS

The same arguments against summary judgment on the ADEA claims likewise compel full review and reinstatement of petitioner's ERISA and common-law claims.

V. THE STANDARD OF REVIEW IS NOT "CLEARLY ERRONEOUS."

Respondent's argument that the clearly erroneous standard applies is important, as mentioned earlier, because it shows that respondent believes *the trial court did engage in fact-finding*. Respondent's eleventh-hour attempt to "change history" on the applicable standard of review was conclusively disproved by the standard of review set forth at *six* (6) different times and places.[11]

Plainly, there is no mention whatsoever in the district court's opinion that there had been an evidentiary hearing, or that the district court somehow considered itself acting as a "finder of fact" so as to trigger the Rule 52 "clearly erroneous standard." The fact respondent finds itself compelled to go to great lengths to try to transform this summary judgment case into a "trial" on the statute of limitations issue *speaks volumes* for the exact point petitioners are trying to make in this Petition – the district court went too far and violated summary judgment standards. Unlike *Hrzenak v. White-Westinghouse Appliance Company*, 682 F.2d 714 (8th Cir. 1982), the plaintiff therein "consented to a pretrial evidentiary hearing on the tolling issue." Here, Heideman did not. On appeal in *Hrzenak*, the Eighth Circuit held that the proceeding below was not "one for summary judgment," but was "a trial on the factual issues underlying Hrzenak's claim for equitable tolling." *Id.*, at 718. The proceeding in *Hrzenak* thus could be treated as a trial because

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[11] (1) PFL's Suggestions in Support of its Motion for Summary Judgment; (2) Plaintiff's Suggestions in Opposition in the district court; (3) the district court opinion itself; (4) in Appellant's Brief in the Eighth Circuit; (5) in PFL's Brief in the Eighth Circuit; (6) finally, in the Eighth Circuit's Opinion rejecting defendant's argument to change the Standard of Review.

– totally unlike this situation – "both parties treated the proceeding as a trial on the factual issues underlying Hrzenak's claim for equitable tolling." *Id.*

On page 28, respondent presses on, stating, "at no time up to the present have petitioners argued that they did not have an adequate opportunity to present all of their evidence on the limitations issue to the district court." *Where has respondent been*? It is petitioners' position, as it has been throughout these proceedings, that they have not had *any opportunity* – much less an "adequate opportunity" – to present evidence on the limitations issue to the district court.

Finally, it is nothing short of fraudulent for the respondent to make its last pitch, that the parties and the district court "consented to and treated the proceedings below as a separate trial on the merits to the court pursuant to Rule 42(b)." The Eighth Circuit rejected this argument, this Court should do so as well – *but* note what admission of trial court overreaching lies beneath the desperation. Petitioners were subjected to nothing more than a "paper trial," which this Court's decisions say is an improper use of summary judgment.

CONCLUSION

Petitioners again respectfully request that a Petition for Writ of Certiorari issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449

POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust
Building
922 Walnut Street
Kansas City, MO 64106
(816) 221-2288

Attorneys for Petitioners